APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-1902
78-1905

Nos.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN W. McGRATH CORP.; PITTSTON STEVEDORING CORP.; and UNIVERSAL MARITIME SERVICE, CORP.,

Petitioners,

v.

CONSOLIDATED EXPRESS, INC. and TWIN EXPRESS, INC.,

Respondents.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

CONSOLIDATED EXPRESS, INC. and TWIN EXPRESS, INC.,

Respondents.

APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1529

CONSOLIDATED EXPRESS, INC.,

Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICES, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D.C. CIVIL No. 76-1645)

No. 78-1530

TWIN EXPRESS, INC.,

Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D.C. CIVIL No. 77-156)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 14, 1978

Before SEITZ, *Chief Judge,* GIBBONS and WEIS, *Circuit Judges*

(Opinion filed April 16, 1979, as amended May 18, 1979)

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Opinion of the Court

GIBBONS, *Circuit Judge:*

We here review an order denying plaintiffs' motion for partial summary judgment on issues of liability in a suit pleading causes of action under § 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, and § 4 of the Clayton Act, 15 U.S.C. § 15. The order is before us on an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The district court identified four controlling questions of law which in its view were worthy of interlocutory review, and a panel of this court granted leave to appeal. Before this court the parties have addressed those questions as well as other considerations which are urged in support of and in opposition to the district court's ruling. We reverse the court's order denying summary judgment on the § 303(b) claim. Because we conclude that material issues of fact may remain regarding the availability of the non-statutory labor exemption to the antitrust laws we affirm the denial of summary judgment on the antitrust claim.

I. The Facts

A. The Parties and their Businesses

The plaintiffs are Consolidated Express, Inc. (Conex) and Twin Express, Inc. (Twin). They are non-vessel owning common carriers engaged in the business of consolidating less than container load (LCL) or less than trailer load (LTL) cargo for shipment between Puerto Rico and the Port of New York (the Port). At their off-pier facilities, they pack the shipments of several customers into large containers which are then trucked to pierside facilities and loaded on board ship. The defendant New York Shipping Association (NYSA) is an association of employers who engage in various businesses related to the passage of freight through the Port. On behalf of its members NYSA conducts collective bargaining negotiations and enters into collective bargaining agreements with various labor organizations, including the defendant International Longshoremen's Association, AFL-CIO (ILA), a labor organization representing longshoremen in the Port. Defendants International Terminal Operating Co., Inc., John M. McGrath Corp., Pittston Stevedoring Corp., United Terminals Corp., and Universal Maritime Services Corp. (the stevedores) are members of NYSA and em-

ployers of ILA longshoremen. They provide stevedoring services to vessels in the Port. Defendants Sea-Land Service, Inc. and Seatrain Lines, Inc. (the vessel owners) are operators of vessels engaged in common carriage by water between the Port and Puerto Rico. Their vessels are designed for the accommodation of large containers. As a part of their business they furnish shippers with containers and trailers for use on board their ships, as well as terminal facilities. They also provide stevedoring services for cargo shipped on their vessels, and thus, like the stevedores, employ ILA longshoremen.

B. Pre-litigation History

Until shortly after World War II most dry cargo was crated by the shipper, delivered to the pier by rail or truck, and loaded into a vessel piece-by-piece by longshoremen. That method of cargo handling has now generally been replaced by the use of vessels specially designed to accommodate mammoth containers. The cargo of large volume shippers may fill one or more containers. That of lower volume shippers is consolidated with the cargo of others in a single container. Many of these containers, when removed from the vessel, serve as semi-trailers, and virtually all are readily shipped by truck. Thus they can be loaded or unloaded ("stuffed" or "stripped" in longshoreman parlance) at sites remote from the pier. This innovation has increased productivity in the movement of cargo by water, but has produced a decline in the demand for longshoreman labor.

When in 1958 ILA struck the members of NYSA, a central issue was the growing use of containers on the docks. The strike was not, however, successful in prohibiting their use, and in the ILA-NYSA contract adopted in 1959 ILA conceded that "any employer shall have the right to use any and all types of containers without re-

strictions." In the next decade fully containerized ships were introduced, and dockside work opportunities for ILA members declined still further. These developments led ILA to negotiate with NYSA, as a part of its 1969 collective bargaining agreement, the Rules on Containers (Rules). The Rules dealt specifically with the consolidation of LCL and LTL cargo. NYSA agreed that all consolidated LCL and LTL cargo lots originating from or to be shipped to a point within fifty miles of the dock would be stripped by longshoremen at dockside. Outbound cargo was to be restuffed into a container, while inbound cargo was to be left on the pier for pickup by the consignees. The Rules provided for a penalty against the employer of $250 for every such container which passed through the dockside without being stripped and stuffed. In 1970 the penalty was increased to $1000 per violation.

Shortly after the 1969 Rules became effective Intercontinental Container Transportation Corp. (ICTC), a consolidator with a business similar to that of Conex and Twin, brought an action in the Southern District of New York seeking injunctive relief and damages from NYSA and ILA on the ground that the Rules violated the Sherman Act. At the same time ICTC filed unfair labor practice charges before the NLRB. In the antitrust action, then District Judge Mansfield granted a preliminary injunction prohibiting the defendants from refusing to handle containers stuffed or stripped by the plaintiff. On appeal from that interlocutory order the Second Circuit reversed, holding that there was little likelihood of ultimate success on the merits, because the collective bargaining agreement of which the Rules were a part probably fell within the labor exemption to the antitrust laws. *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n,* 426 F.2d 884 (2d Cir. 1970) (*ICTC*). In ICTC's unfair labor practice case, the Regional Director refused to issue a com-

plaint on the ground that the Rules on Containers were a valid work preservation agreement, and the General Counsel denied the appeal. Joint App. 303a-305a.

The Rules on Containers were carried forward in the 1971-1974 collective bargaining agreement negotiated between ILA and the Council of North Atlantic Shipping Associations (CONASA), an employer bargaining unit composed of NYSA and employer associations in five other North Atlantic ports. But for reasons that are in dispute, the Rules were not consistently enforced. Conex and Twin were therefore able to continue in the business of consolidating LCL and LTL lots, using containers furnished by the vessel owners. Access to such containers was essential to the business of the consolidators, since the vessel owners' ships could carry only specially designed containers, and since prior to October, 1974, Sea-Land and Seatrain were two of only three container carriers operating between the Port and Puerto Rico.[1]

The failure to enforce the Rules led to attempts to improve their effectiveness. On January 25-29, 1973, representatives of CONASA, acting for the employers it represented, met with representatives of ILA in Dublin, Ireland. There those parties negotiated and executed Interpretive Bulletin No. 1, generally known as the Dublin Supplement. The Dublin Supplement established new mechanisms for the enforcement of the Rules against consolidators. It provided that off-pier consolidators operating within fifty miles of the Port were to be considered as operating in violation of the Rules. Consolidators could not avoid application of the Rules by relocating their facilities beyond the fifty mile limit, because the agreement contained a so-called "evasion" or "runaway shop" provision. The Supplement also provided for the establishment and circulation

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[1] The third shipper, Transamerica Trailer Transport, Inc. (TTT), is not a defendant in this action.

to all carriers and stevedores of a list of such violators, and vessel owners were to be fined $1000 for each container furnished to them. The Dublin Supplement was to be policed by a joint ILA-NYSA Container Committee.

In February, 1973, the vessel owners, using ILA labor, commenced stripping and restuffing outbound LCL and LTL containers which had already been stuffed by employees of Conex and Twin at their off-pier facilities and trucked to the pier for shipment to Puerto Rico. Beginning in March, 1973, the three vessel owners operating in the Puerto Rican trade refused to furnish Conex and Twin with empty containers. On April 13, 1973, NYSA and ILA issued a joint statement to NYSA members, naming fourteen consolidators, including Conex and Twin, as operating in violation of the Rules. The notice activated the provision in the Dublin Supplement requiring all NYSA members to refuse containers to the listed companies. These actions had the effect of terminating the plaintiffs' business of freight consolidation for the New York-Puerto Rico trade.

On June 1, 1973, Conex, faced with the destruction of its business, filed charges with the National Labor Relations Board (NLRB). It alleged that by agreeing to the Rules and Dublin Supplement NYSA and ILA had violated § 8(e)[2] of the Labor Management Relations Act (LMRA), and that by seeking to enforce that agreement ILA had violated § 8(b)(4)(ii)(B) of the Act.[3] Thereafter the General Counsel of the NLRB, acting pursuant to § 10(*l*) of the Act, 28 U.S.C. § 160(*l*), filed a complaint against ILA in the United States District Court for the

[2] 29 U.S.C. § 158(e). This section prohibits labor agreements by virtue of which an employer ceases to deal with another employer.

[3] 29 U.S.C. § 158(b)(4)(ii)(B). This section forbids coercion the object of which is to force any employer to cease doing business with another employer.

District of New Jersey seeking preliminary injunctive relief pending final dispositon of those charges by the Board. Judge Lacey conducted a hearing on the § 10(*l*) application at which an extensive record was compiled respecting the Rules, the Dublin Supplement, and their effect upon the business of Conex. In that hearing the General Counsel contended that the Conex containers had not historically been stripped and restuffed at the docks by longshoremen, and thus that the activity of which Conex complained was secondary, without a work preservation justification, and in violation of §§ 8(b)(4)(ii)(B) and 8(e). ILA made the opposite contention, and testimony was presented on the issue so drawn. The district court concluded that the General Counsel's theory was substantial and not frivolous. It therefore enjoined enforcement of the Rules against Conex, the charging party. *Balicer v. International Longshoremen's Ass'n,* 364 F. Supp. 205 (D. N.J. 1973), *aff'd,* 491 F.2d 748 (3d Cir. 1973). Following a separate hearing on substantially identical charges filed with the NLRB by Twin, the General Counsel later obtained a § 10(*l*) injunction prohibiting enforcement of the Rules against it. *Balicer v. International Longshoremen's Ass'n,* 86 L.R.R.M. 2559 (D. N.J. 1974).

Before the NLRB the Conex and Twin charges were consolidated for hearing. The parties stipulated that the record made before Judge Lacey in the § 10(*l*) case, as supplemented by affidavits submitted by intervenor International Brotherhood of Teamsters, Local 807, which represents Conex employees, and by additional affidavits submitted by ILA and NYSA, would constitute the record for the unfair labor practice proceedings. On the basis of that record an Administrative Law Judge found that the Rules and Dublin Supplement, and the resulting boycott of Conex and Twin, were addressed to the labor relations of the NYSA employer-members with their own employees. He therefore concluded that the boycott involved protected

primary activity. The NLRB disagreed. The Board rejected the argument that the agreement was a valid effort by ILA to preserve for its members work which they had historically performed. In the Board's eyes, the "work in controversy" was the stuffing and stripping work performed by LCL and LTL consolidators at their off-pier facilities, not loading and unloading of ships at dockside by longshoremen. Thus the Rules could not be justified as a work preservation agreement, valid under the Supreme Court's interpretation of § 8(e) in *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612 (1967). Moreover, even if ILA once had a valid claim to the work of stuffing and stripping containers, the Board concluded, that claim had been abandoned in the 1959 ILA-NYSA agreement authorizing the use of container vessels. It therefore held the agreement embodied in the Rules and Dublin Supplement to be a violation of § 8(e) because its object was to force NYSA members to cease doing business with the consolidators. The NLRB also held that ILA's actions in enforcing the agreement were unfair labor practices under § 8(b)(4)(ii)(B). It entered an appropriate cease and desist order on December 4, 1975. *Consolidated Express, Inc.,* 221 N.L.R.B. No. 144 (1975).

NYSA and ILA petitioned for review to the United States Court of Appeals for the Second Circuit. The NLRB cross-petitioned for enforcement. Conex, Twin and Teamsters Local 807 intervened. The Second Circuit held that the Board's conclusion that the work in controversy was that historically performed by employees of the consolidators was supported by substantial evidence, and thus that its analysis of the § 8(b)(4) and § 8(e) issues was sound.[4] It therefore enforced the Board's order and denied

[4] The court announced that it was "not similarly impressed" with the Board's other arguments in support of its position. 537 F.2d at 712.

the NYSA and ILA petitions for review. *International Longshoremen's Ass'n v. NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041, *reh. denied,* 430 U.S. 911 (1977). A petition for reconsideration and recall of mandate was denied by the Second Circuit on December 16, 1977. A subsequent petition to the NLRB to reopen the unfair labor practice hearing was denied on August 12, 1978.

II. Proceedings in the District Court

Conex and Twin filed substantially identical complaints in the district court, and on April 22, 1977 the two actions were consolidated. In Count I the plaintiffs alleged that the defendants' enforcement of the Rules on Containers and Dublin Supplement constituted a group boycott of the plaintiffs that is *per se* illegal under §§ 1 and 3 of the Sherman Act. 15 U.S.C. § 1, 3 [sic] They sought treble damages pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, for injury to their business or property resulting from that boycott. In Count III plaintiffs alleged that ILA committed unfair labor practices in violation of § 8(b)(4)(ii)(B) of the LMRA, that those violations injured plaintiffs in their business or property, and that ILA was liable for such damages under § 303(b) of the LMRA, 29 U.S.C. § 187(b).[5] A jury trial was demanded. Thereafter Conex and Twin moved for partial summary judgment as to liability on Counts I and III. They contended that the de-

[5] That section provides:

> Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of [section 301] hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

cision of the NLRB, enforced by the Second Circuit, established all facts material to liability issues, and that the defendants were collaterally estopped from attempting to relitigate those issues. Thus, they urged, only the amount of damages remained for trial.

In response to that motion the defendants contended that the judgment in the Second Circuit should have no issue-preclusion effect; that the activities complained of were within the protection of the non-statutory labor exemption to the antitrust laws; that if non-exempt, those activities should be tested by the rule of reason; that there were material issues of fact as to certain defenses; and that the § 303(b) claim was time barred.

The district court, although it accepted the Conex-Twin contentions in several respects, nevertheless denied partial summary judgment on both counts. Recognizing, however, that the order involved controlling questions of law as to which there is a substantial ground for difference of opinion, and that if those questions were decided in plaintiffs' favor partial summary judgment on one or both of the counts in issue might have been proper, the court on February 22, 1978 amended the opinion to include the formal statement required by 28 U.S.C. § 1292(b). The plaintiffs filed a timely notice of appeal, and this court permitted it.

III. Scope of Review

The parties disagree as to what legal issues may be considered on this appeal. Both sides agree that the four questions of law certified by the district court are properly before us.[6]

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[6] These are:

1. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury "in its business" which is compensable in an action under Section 303 of the Labor Management Relations Act?

2. Does the NLRB's finding of an unfair labor practice foreclose consideration of the labor exemptions, statutory or implied, to the antitrust laws?

3. Must the legality of the Rules on Containers be tested against a *per se* rule of antitrust violation?

4. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury to its business which is compensable under the Clayton Act?

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In supporting their motion to strike portions of the appellees' briefs, appellants suggest that since the defendants prevailed in the district court on the motion for summary judgment they may not raise issues of law decided adversely to them, or not decided at all. Absent a cross-appeal, which is unavailable to a prevailing party, they contend that these issues are not properly before this court. The appellees in turn argue that because the district court refused to identify as controlling questions several equitable defenses, those defenses may not be considered in a § 1292(b) appeal. Neither view is correct. In *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974), the court stated the rule governing § 1292(b) interlocutory appeals:

> [O]nce leave to appeal has been granted the court of appeals is not restricted to a decision of the question of law which in the district judge's view was controlling.

496 F.2d at 754. *Accord, Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 865 n.2 (3d Cir.) (Seitz, C.J.,

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concurring), *cert. denied,* 431 U.S. 933 (1977); *Johnson v. Alldredge,* 488 F.2d 820 (3d Cir. 1973), *cert. denied,* 419 U.S. 882 (1974). This rule accords with fundamental principles of appellate review. An appeal pursuant to § 1292(b), like any other, is taken from the order of the district court, not from its opinion, and the court is "called upon not to decide the question certified, but to decide an appeal." *Johnson v. Alldredge, supra,* 488 F.2d at 823. When an order or judgment is before a reviewing court, "[t]he prevailing party may . . . assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams,* 397 U.S. 471, 475 n.6 (1970); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 381 n.4 (1970); *see* Note, *Federal Jurisdiction and Procedure—Review of Errors at the Instance of a Non-Appealing Party,* 51 Harv. L. Rev. 1058, 1059-60 (1938).

In this case each argument advanced by the appellees would, if accepted, support the refusal to enter summary judgment of liability in favor of Conex and Twin on one or both counts. If, on the other hand, there are no genuine issues of material fact remaining to be tried, and the district court committed the legal errors of which appellants complain, we may correct those errors, and direct the entry of such a judgment. We could, of course, decline to consider all of the legal issues tendered once we found one which would sustain the denial of summary judgment. But considerations of judicial economy suggest that when a § 1292(b) appeal is taken from the denial of summary judgment an appellate court should ordinarily consider all issues "properly put in dispute" bearing upon whether entry of judgment was appropriate. *Johnson v. Alldredge, supra,* 488 F.2d at 823. Thus the several motions to strike portions of the parties' briefs will be denied, and we will consider all grounds advanced in support of the grant of

summary judgment and all grounds suggested for sustaining its denial.

IV. The § 303 Claims Against ILA

Under § 303(a) of the National Labor Relations Act, 29 U.S.C. § 187(a), it is unlawful for a labor organization to engage in any activity or conduct defined as an unfair labor practice in § 8(b)(4) of the Act. Persons injured in their business or property by such a violation may bring suit for money damages against the labor organization which committed it.[7] Conex and Twin point out that the NLRB found that ILA had committed § 8(b)(4) unfair labor practices, and that the Second Circuit affirmed that finding. That determination, they suggest, is binding here, leaving nothing to be litigated except the determination of damages. The appellees resist this suggestion for reasons we now address.

A. Collateral Estoppel

The district court held that the NLRB's finding that the ILA had committed a § 8(b)(4) violation, made in a proceeding to which both ILA and the plaintiffs were parties, collaterally estops it from litigating its liability for damages on the § 303(b) count. ILA contends this holding was error.

First, ILA urges that the finding by the NLRB, an administrative agency, that the boycott complained of was illegal, is not entitled to res judicata effect. The cases relied upon in support of this contention[8] were, however, decided before the Supreme Court's decision in *United*

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[7] See note 3 *supra.*

[8] *See, e.g.,* Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Union, 359 F.2d 598, 602-03 n.7 (2d Cir.), *cert. denied,* 385 U.S. 832 (1966); United Brick & Clay Workers of America v.

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States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966), which stated that:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Since *Utah Construction* courts in several circuits have held that prior NLRB unfair labor practice determinations were controlling on the issue of liability, as to both facts and law, in a subsequent § 303(b) damage action. *E.g., International Wire v. Local 38, IBEW*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973) (res judicata against charging party); *Texaco, Inc. v. Operative Plasterers & Cement Masons*, 472 F.2d 594 (5th Cir.), *cert. denied*, 414 U.S. 1091 (1973) (res judicata against charged party); *Painters District Council 38 v. Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969) (res judicata against charged party); *Eazor Express, Inc. v. General Teamsters Local 326*, 388 F. Supp. 1264, 1266-67 (D. Del. 1975) (res judicata against charged party). These holdings are undoubtedly sound. The NLRB has been designated by Congress as the tribunal of choice for the adjudication of unfair labor practices, and the doctrine of primary jurisdiction is a judicial recognition of the importance of that designation. *See, e.g., Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684-85 (1965). Board decisions are subject to judicial review on all issues of law. Factual issues are reviewed by

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Deena Artware, Inc., 198 F.2d 637 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953). In Riverton Coal Co. v. UMW, 453 F.2d 1035, 1042 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972), the legal issues sought to be foreclosed on the basis of a prior agency decision had not been decided in prior NLRB proceedings involving the same parties. Hence that case is inapposite here.

a substantial evidence standard, one at least as rigorous as that applied in reviewing non-jury judicial determinations, Fed. R. Civ. P. 52(a), and a good deal more rigorous than is applied to jury verdicts. When an NLRB decision subject to such judicial review has become final it is not readily apparent that it should have any less issue preclusion effect than would judgments resulting from non-jury or jury trials.

ILA next argues that even assuming applicability of collateral estoppel to issues of fact, the issues in this case are primarily legal, and on legal issues less deference to a prior decision is appropriate. The § 303(b) cases referred to above, giving res judicata effect to NLRB unfair labor practice judgments, recognize no such distinction. Moreover, both the Supreme Court and this circuit have rejected that approach. In *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 601-02 (1948), the Court made clear that issue preclusion applies both as to issues of fact and as to issues of law, so long as the same transactions and legal principles are involved and there has been no subsequent change in the governing law. *See Vanderveer v. Erie Malleable Iron Co.*, 238 F.2d 510, 514-15 (3d Cir. 1956), *cert. denied*, 358 U.S. 937 (1957). In *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 844-455 & n.10 (3d Cir. 1974), which concerned the collateral estoppel effect of a prior judicial determination that a collective bargaining agreement fell within the labor exemption to the antitrust laws, we expressly recognized that a prior determination of a mixed question of fact and law precluded relitigation of that issue, provided that the party to be estopped had "a full and fair opportunity" to present his claim in the prior litigation. *Id.* at 844.[9]

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[9] ILA also argues against recognition of the judgment in the unfair labor practice case in that the NLRB's proceedings are di-

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It is a settled principle of administrative law that the courts give considerable deference to the construction of statutes by those agencies charged with the primary responsibility for their enforcement. *E.g., Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969). Thus it is arguable that the scope of judicial review of agency decisions on questions of law is narrower than would be appellate review of court decisions on legal issues. But that difference does not suggest that res judicata on legal issues should be less applicable to agency judgments, for the rule of deference to agency interpretations of governing statutes is binding not only on a court reviewing an agency decision, but also on a court deciding a legal issue in the first instance. *E.g., Zemel v. Rusk,* 381 U.S. 1, 11-12 (1965). Moreover, in this case the decision of the NLRB was taken to the Court of Appeals for the Second Circuit which passed upon the legal issues involved.

Finally, ILA suggests that for two reasons it did not receive a "full and fair opportunity" to litigate before the NLRB. First, it contends that the Board's procedures provided inadequate opportunity for discovery against Conex and Twin. Had ILA been able to avail itself of the

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rected toward vindication of "public" rights, while those asserted in the § 303(b) count are only private. It is true that the charging party in an unfair labor practice proceeding before the Board advances the public interest in a fair and orderly labor marketplace. But the typical charging party acts primarily in his own interest to halt conduct that is injuring him personally. Equally when resorting to a § 303(b) remedy the plaintiff, while acting primarily in his own interest, vindicates the public policy of the National Labor Relations Act prohibiting unfair labor practices. That public policy, as interpreted by the NLRB, should in the § 303(b) case determine whether or not there has been a violation. We are therefore unpersuaded that the differing object of proceedings before the NLRB should serve as a ground for reducing their collateral estoppel effect.

discovery provisions of the Federal Rules of Civil Procedure, it argues, it might have been able to establish that Conex and Twin had developed their "tradition" of offpier consolidation by fraudulent avoidance of the 1969 Rules on Containers, and had such evidence been available it might well have led to a different result before the Board.

As a general rule, recognition of a judgment in a prior action between the same parties should be denied only upon a compelling showing of unfairness. *See* Restatement (Second) of Judgments (Tentative Draft No. 1, 1973) § 68.1 and Comment f. This is particularly true where, as here, the parties litigant were represented by expert lawyers who had every reason to expect that a defeat in the first action might lead to a second suit founded on the judgment. The Supreme Court has suggested, however, that in an appropriate case a district court may deny collateral estoppel effect on the ground of unfairness, even to a judgment in a prior action between the same parties, if there are "procedural opportunities available to the [defendant] that were unavailable in the first action of a kind that might be likely to cause a different result." *Parklane Hosiery Co. v. Shore,* 47 U.S.L.W. 4079, 4082 & n.15 (U.S. Jan. 9, 1979). The court included discovery among the procedural devices the unavailability of which in the first action may militate against application of estoppel by judgment. *Id.* at n.15. On the record considered by the district court, however, ILA has made no showing of unfairness. It stipulated before the NLRB that the record in *Balicer v. ILA, supra,* together with the supplemental affidavits submitted, sufficed for the decision of the unfair labor practice charges. When it made that stipulation ILA knew that Mr. Jacobs, a principal witness for the charging parties in *Balicer,* had previously testified before the Federal Maritime Commission regarding a pattern of payoffs on the docks which

facilitated evasion of the 1969 Rules. Thus the parties before the Board were undoubtedly on notice of the likely existence of the same evidence they seek to introduce in this proceeding. Nevertheless, ILA stipulated to a more limited record, bypassing the opportunity to resort to the not insubstantial provisions for production and examination of witnesses and documents available in NLRB cases. *See* 29 C.F.R. §§ 102.30, 102.31 (1977). Instead of probing the transactions described in the Jacobs testimony, ILA stipulated that "there [were] no material issues of credibility in the record before the [Board] for resolution requiring a formal hearing," and assured the ALJ that the unfair labor practice charges "[could] be fully resolved on the basis of the exhibits and transactions of testimony entered in the [*Balicer* case]." Joint App. 209-210. Thus whatever the faults of the discovery procedures available before the Board, ILA's failure to discover additional evidence was not the consequence of those procedures, but of its own decision not to seek or present further evidence in the NLRB proceeding. It cannot rely on procedural inadequacies in the NLRB case which in no way affected its outcome.

ILA relies on *Hudson River Fishermen's Ass'n v. FPC*, 498 F.2d 827 (2d Cir. 1974), for the proposition that collateral estoppel should not be applied where relevant evidence has come to light that could not have been discovered in the prior proceeding by the exercise of due diligence. That case involved an application to reopen a licensing proceeding before the Federal Power Commission in order to correct an error in a technical report which had been relied upon in that proceeding, which error could not have been discovered by the exercise of due diligence. The Second Circuit, reviewing the FPC's refusal to reopen the hearing, construed Section 313(b) of the Federal Power Act, 16 U.S.C. § 825(*l*)(b), as permitting reopening, and

remanded for a hearing. *Id.* at 833-34. Assuming that a principle similar to that announced in the *Hudson River* case also applies in NLRB proceedings, this is not the proper forum for its application. For as that case suggests, if ILA has found new evidence, its appropriate remedy is to seek to reopen the unfair labor practice case either before the NLRB or the Second Circuit. We note that such attempts have been made and rejected.[10]

Second, ILA argues that collateral estoppel is unfair because the Board's resolution of the unfair labor practice issue represented an abrupt and unanticipated change in the applicable legal doctrine. Prior to 1975, they argue, there were indications that the Rules on Containers were legal under both the antitrust laws and the Labor Act.[11] ILA cites no authority for the proposition that collateral estoppel effect may be denied to a judgment because it reflects a change in the prior applicable law, and in the § 303 context such a rule appears unwarranted. A primary pur-

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[10] These rejections also may indicate that evidence of the manner in which Conex and Twin acquired the stuffing and stripping work would not have had any impact on the NLRB decision. It was the General Counsel position in the § 10(*l*) case before Judge Lacey, and that of the charging parties before the Board, that regardless of how the latter acquired the work the Rules on Containers were an illegal work reacquisition agreement. The Board appears subsequently to have adopted that position. *See* International Longshoremen's Ass'n (Dolphin Forwarding, Inc), 236 NLRB No. 42, 98 LRMM 1276, 1277 n.3 (1978). Because we hold that there was an adequate opportunity to litigate the work acquisition contention, however, it is not necessary to rest our holding on the probable irrelevancy of the tendered evidence to the unfair labor practice determination.

[11] In *International Longshoremen's Ass'n, Local 1248 (U.S. Naval Supply Center)*, 195 N.L.R.B. 273 (1972), an attempt to enforce the Rules against an off-pier consolidator was held to be an unlawful secondary boycott. Thus a full year before the enforcement of the Dublin Supplement began the NLRB had questioned its legality.

pose of the § 303(b) remedy is to make the plaintiff whole for injury done to his business in violation of federal labor law. *Teamsters Local 20 v. Morton,* 377 U.S. 252, 260 (1964). To allow the union a defense of belief in legality in § 303 cases would cast the burden of such losses upon innocent parties in direct contravention of that policy. While the unforeseeability of an unfair labor practice judgment may reduce the deterrent value of the § 303 sanction, Congress's essential compensatory purpose remains, and should not be thwarted. Even if such a rule were recognized it might not help ILA here, for the prior actions upon which it claims to have relied never resulted in a final determination that the Rules on Containers were legal. Moreover, both the ICTC cases were decided prior to the adoption and enforcement of the Dublin Supplement, a development which might well have changed the earlier tribunals' view of the problem. The claim of an unanticipated change in the law does not persuade us that the judgment in the NLRB case should not bind ILA.

B. The Statute of Limitations

ILA pleads that the § 303(b) claim is time barred by the one year Puerto Rico statute of limitations, P.R. Laws Ann. tit. 31, § 5298(2), because Conex and Twin are incorporated in that Commonwealth and each conducts one end of its freight consolidator business there. The district court rejected that contention, holding that the consolidators' § 303(b) claim was governed by New Jersey's six year statute of limitations for actions in contract, N.J. Stat. Ann. § 2A:24-1 (West Supp. 1978), and thus was not time-barred. No federal statute imposes an express limitation upon actions brought under § 303(b) of the Labor Management Relations Act. The parties agree that in such a vacuum a federal court will apply the law of the state in which it sits. *See, e.g., United Auto Workers v. Hoosier*

Cardinal Corp., 383 U.S. 696 (1966); *Cope v. Anderson,* 331 U.S. 461 (1947). At this point they part company.

ILA argues that a federal court sitting in New Jersey on a § 303(b) case would look not to the most closely analogous New Jersey statute of limitations, but rather to New Jersey's choice of law rules. Under those rules, it suggests, New Jersey would apply not its own six year statute of limitations, but that of Puerto Rico. In advancing this argument ILA relies on the Rules of Decision Act, 28 U.S.C. § 1652, as interpreted in *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941), and *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945). That statute and those authorities, however, deal with the law governing causes of action arising under state law. When, as in § 303(b) cases, the cause of action arises under federal law, they have no applicability. Which state statute is to be borrowed and how it is to be applied to a cause of action based on federal law are federal law questions, and are determined by federal statutory policy. *Holmberg v. Armbrecht,* 327 U.S. 392, 395 (1946). Thus state choice of law rules can govern the choice of a statute of limitations for a § 303(b) claim only if reference to those rules furthers substantive federal policy. *Moveicolor, Ltd. v. Eastman Kodak Co.,* 288 F.2d 80, 83-84 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961).

This principle has been recognized in § 303(b) cases. In *United Mine Workers v. Railing,* 401 U.S. 486 (1970), a case presenting, as does this, both a § 303(b) claim and an antitrust claim against a labor organization, the Court remanded to the Fourth Circuit so that it could consider whether the state statute of limitations applicable to the § 303(b) claim should be construed to apply, with respect to accrual of the cause of action, in the same manner as 15 U.S.C. § 15(b) had been construed in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1970), as applying to an antitrust claim. On remand Judge Craven recog-

nized that both § 303(b) and § 4 of the Clayton Act provided for recovery for injury to business or property, and concluded that the state statute of limitations governing the § 303(b) claim should be interpreted in the same manner as 15 U.S.C. § 15(b). Indeed he went further, suggesting to the district court that on remand it should consider whether to read into the state statute a tolling provision similar to 15 U.S.C. § 16(b) (which tolls § 15(b) for private antitrust actions during the pendency of government enforcement actions), to toll the time bar against the § 303(b) count during the pendency of unfair labor practice proceedings before the NLRB. *Railing v. United Mine Workers,* 445 F.2d 353 (4th Cir. 1971). *See also Kinty v. United Mine Workers,* 544 F.2d 706, 723 (4th Cir. 1976), *cert. denied,* 429 U.S. 1093 (1977); *Metropolitan Paving Co. v. International Union of Operating Eng'rs,* 439 F.2d 300, 306 (10th Cir.), *cert. denied,* 404 U.S. 829 (1971); *cf. Kreshtool v. International Longshoremen's Ass'n,* 242 F. Supp. 551, 554 (D. Del. 1965). These cases are authority for the rule that in a § 303(b) case the specific state statute of limitations that is adopted, and the manner of its adoption, are to be determined by the policies that underlie the federal regulatory statute.

ILA argues that *Cope v. Anderson, supra,* indicates that state choice of law rules ought invariably to determine the limitations period for federal causes of action. In *Cope,* an action brought under the National Bank Act, 12 U.S.C. §§ 63, 64, the Court applied the forum state's "borrowing statute" to determine the limitations period under the Act. The explanation for this holding is obscure, and it is far from certain that the *Cope* rationale was intended to extend either to judge-made choice of law rules or to actions under § 303(b). Furthermore, in a more recent decision, *UAW v. Hoosier Cardinal Corp., supra,* the Court expressly reserved the issue whether state choice of law rules should be

applied in determining the applicable statute of limitations under § 303(b). 383 U.S. at 705 n.8. *Cope* cannot, therefore, be regarded as foreclosing that question, which is squarely before us.

We resolve it in favor of a federal rule. The choice of law rule to be applied to a § 303(b) cause of action must meet two criteria. It must produce results consistent with national labor policy, and it should, insofar as is possible, be relatively easy to administer. On both counts, we think, application of a federal choice of law rule to determine the governing time bar is preferable. Federal labor policy may be thwarted by state limitations periods unduly short or discriminatory. *Cf. UAW v. Hoosier Cardinal Corp., supra,* 383 U.S. at 707 n.9. State choice of law rules, geared as they are to geographical factors or state policy interests, may be insensitive to this federal concern. From the viewpoint of ease of administration, state choice of law rules have an initial advantage. Already formulated, they are readily at hand. But their frequently complex calculus of contacts and interests may produce considerable difficulty in application and uncertainty of outcome without any corresponding improvement of result. A federal rule, in contrast, recognizing the more limited range of factors relevant under federal law, can be simplified.

While neither party has briefed the issue of the appropriate federal choice of law rule for § 303(b) cases, we conclude upon careful reflection that as a general rule the governing statute of limitations should be that of the state in which the federal court sits, unless a party can make a compelling showing that the application of that statutory time bar would seriously frustrate federal labor policy or work severe hardship to the litigants. *Cf. UAW v. Hoosier Cardinal Corp., supra,* 383 U.S. at 706. *See* Hill, *State Procedural Law in Federal Nondiversity Litigation,* 69 Harv. L. Rev. 66, 102-03 & n.64 (1955). Reference to the

forum state's statute of limitations absent some such showing provides an efficient and readily administrable rule for the vast majority of § 303(b) cases, while leaving leeway for the relatively rare instances in which the application of the forum state's statute would seriously distort the operation of the § 303 remedy. How serious that distortion must be to displace the forum state's statute of limitations we need not resolve in this case. Here the district court applied that limitations period. Neither party suggests that its application endangers federal labor policy or creates any risk of unfairness to the litigants. Absent such danger or risk the district court's application of the New Jersey statute must be affirmed.[12]

C. Illegality

ILA argues that even if it is collaterally estopped to contest the § 8(b)(4) violation, and even though the damage action was timely filed, its contention that Conex and Twin were operating at the time of the unfair labor practices without freight forwarder permits issued by the Interstate Commerce Commission (ICC), would, if such licenses were required, be a complete defense to the § 303(b) claim.[13] Conex and Twin have always asserted that they are not freight forwarders within the meaning of Part IV of the Interstate Commerce Act, 49 U.S.C. § 1002(a)(5)(A), and

[12] Because we hold that the choice of a governing limitations period, borrowed or otherwise, does not depend on New Jersey choice of law rules we need not decide whether, had we concluded New Jersey choice of law rules applied, the result would be different. We note, however, that on this record it seems likely that New Jersey would apply its own statute of limitations. *See* Schum v. Bailey, 578 F.2d 493 (3d Cir. 1978); Allen v. Volkswagen of America, Inc., 555 F.2d 361, 364 (3d Cir. 1977) (Seitz, C.J., concurring).

[13] A similar illegality defense is raised with respect to the § 4 Clayton Act claim as well, and is discussed, *infra*, Part V. C.

that the operating authority granted them by the Federal Maritime Commission (FMC) sufficed. The district court, without determining whether or not ICC licenses were required, concluded that if ILA could establish that they were, a judgment in favor of Conex and Twin on the § 303(b) claim would be precluded.

The district court recognized that in an unfair labor practice proceeding before the Board the charging party's violation of an unrelated statute is not a defense to a charge of unlawful secondary boycott activity. *See, e.g., NLRB v. Springfield Building & Construction Trades Council,* 262 F.2d 494 (1st Cir. 1958). But unlike an action before the Board, a damage action for injury to "business or property" under § 303(b), the district court held, was "purely compensatory," designed to return to plaintiffs only those losses to which they were legally entitled. If the plaintiffs' businesses were conducted without the required ICC permit, the court reasoned, they were "nonexistent in the eyes of the law, [and] entitled to no legal protection." District Court Opinion at 10, Joint App. 773.

This argument has a simplistic surface appeal reminiscent of the long discredited doctrine that a person driving without a license is a trespasser on the highway who may not recover for injury negligently inflicted upon him. *See, e.g., Potter v. Gilmore,* 282 Mass. 49, 184 N.E. 373 (1933); Annotation, 87 A.L.R. 1462. Like that doctrine the argument suffers from serious flaws. First, despite the fact that only compensatory damages may be recovered under § 303(b), *e.g., Teamsters Local 20 v. Morton,* 377 U.S. 252, 260 (1964), such actions, like the remedies available before the NLRB, serve an important deterrent purpose as well. Discussing the draft legislation that became § 303(b), Senator Taft, its sponsor, observed:

> . . . I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes.

93 Cong. Rec. 5060; II Leg. Hist. of Labor Management Relations Act of 1947 at 1371, *cited in Twin Excavating Co. v. Garage Attendants Local 731,* 337 F.2d 437, 438 (7th Cir. 1964). Indeed, a secondary boycott is in the nature of a tort, and it is settled doctrine that almost all causes of action sounding in tort have deterrent as well as compensatory rationales. *E.g.,* G. Calabresi, The Costs of Accidents (1970). Thus the effect of the proposed illegality defense is to sacrifice a recognized purpose of § 303 (b), the deterrence of secondary boycotts in violation of federal labor policy, in the interest of encouraging compliance with an entirely unrelated federal policy of ICC licensing. The regulatory scheme enforced by the ICC has goals substantially unrelated to the federal policy against secondary boycotts, and its own independent set of statutory sanctions. *See* 49 U.S.C. § 1021. Absent contrary evidence, we assume that Congress felt these sufficient for the enforcement of the ICC regulatory scheme. The creation by judicial fiat of an additional sanction—the withdrawal of the protection of § 303(b) because of a technical violation of an ICC licensing requirement—must be viewed, as was the "trespasser on the highway" doctrine, as enforcing a punishment disproportionate to the crime. In short, the proposed defense would disrupt the balance struck by Congress between permissible and impermissible labor activities, with no discernible benefit, and perhaps some loss, to the ICC regulatory scheme.

Thus we hold that the district court erred in concluding that the absence of an ICC license would be a defense to liability under § 303(b) for the unfair labor practices found by the NLRB. We express no view on the question whether, in the trial on damages, evidence of the absence of such a license would bear upon the extent of injury to the business or property of Conex and Twin. That, we think, would depend upon the proof of such injury, and the

relationship of that proof to the ability of Conex and Twin to carry on their business without a Part IV permit.

D. Equitable Defenses

ILA's equitable defenses tendered in opposition to summary judgment on liability were summarized by the district court as follows:

> ILA also argues estoppel *en pais,* laches, and equitable estoppel. These equitable theories are invoked based on ILA's claims that Conex intentionally avoided Challenging the Rules on Containers when they were first implemented because, in fact, Conex thrived on their existence: watching the enforcement of the Rules drive its competitors out of business while developing techniques, including bribery of dock bosses and alteration of shipping documents, to evade the Rules' strictures.

District Court Opinion at 14; Joint App. at 777. Without extended analysis the court ruled that a fuller development of the record was needed before it could rule on the sufficiency of the tendered defenses. Conex and Twin contend that this was error because the affidavits filed in support of the defenses were legally insufficient.

We start with the observation that the plaintiffs do not seek damages for any injury to their business or property occurring prior to the adoption of the Dublin Supplement in January, 1973. It was not until February, 1973, that the defendants commenced stripping and restuffing plaintiffs' containers. It was not until March, 1973, that plaintiffs were refused containers by the vessel owners. It was not until April, 1973, that they were blacklisted. In June, 1973, Conex filed an unfair labor practice charge with the NLRB. The record contains nothing suggesting that after January, 1973 Conex or Twin took or failed to take any

action which could be the predicate for a defense of laches or of estoppel. Indeed ILA does not so argue. Thus we can eliminate from consideration any possibility that a § 303(b) cause of action which accrued in January, 1973, was barred by laches. *Cf. Falsetti v. Local 2026, UMW,* 355 F.2d 658, 662 (3d Cir. 1966).

On appeal the ILA concentrates its equitable defense arguments on the period prior to the adoption of the Dublin Supplement. It points to two factors which it suggests are equitable bars to recovery for the post-Dublin Supplement injuries. First, Conex and Twin failed to file unfair labor practice charges between 1969, when the Rules were adopted, and 1973, when they were supplemented and finally enforced. Second, prior to 1973, while the Rules were in effect, Conex and Twin managed to evade their enforcement. This conduct, ILA contends, gives rise to an estoppel *en pais.* It reasons that the plaintiffs knew they were targets of the Rules as early as July, 1969, and that they took steps, including forgery, bribery, and diversion of cargo to other ports, to make it appear they were in compliance. At the same time, the plaintiffs failed to bring an action before the Board to challenge the Rules on Containers. "Since appellees have always obeyed both the 10(*l*) injunction and the Board's cease-and-desist order, such timely challenge would have prevented any further violations of the Act and put an end to Appellant's [sic] damages while they were minimal." (ILA Brief at 33-34). The effect of these evasionary and dilatory tactics, ILA contends, was to persuade it (a) that the Rules were being enforced and (b) that they were not harmful. In reliance on those appearances, it proceeded to force the adoption of the Dublin Supplement. Since the plaintiffs' wrongful conduct induced the adoption of the Dublin Supplement, ILA contends, they cannot now claim compensation for injury resulting from its enforcement.

The defendants have not cited, and we have not found, any case in which the defense of equitable estoppel or estoppel *en pais* has been recognized in an action brought pursuant to § 303(b) of the Act. We need not decide whether such a defense should be recognized, however, because it is clear that even on the defendants' theory of estoppel *en pais,* the affidavits supporting the defense were insufficient to sustain it. In the case upon which ILA principally relies, the four elements of estoppel *en pais* are defined:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct must be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

United States v. Georgia Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970) (quoting *Hampton v. Paramount Pictures Corp.,* 279 F.2d 100, 104 (9th Cir.), *cert. denied,* 364 U.S. 882 (1960)). The relevant facts about the impact of the Rules apparently were known to the plaintiffs, and thus the first element of an estoppel exists. But there are no facts in the record to support any of the other three elements of the defense. ILA has cited no evidence for its implausible assertion that the consolidators' evasion of the Rules or failure to file an unfair labor practice charge was intended, or could reasonably have been believed to be intended, to induce it to bargain for the Dublin Supplement. The pleadings and affidavits indicate that the plaintiffs hoped that ILA would not respond at all, so that their evasion of the Rules could continue. Nor is the failure of Conex and Twin to bring an NLRB case prior to 1973 a fact which ILA had a "right to believe" was intended to induce the adoption of the Supplement. A rule that persons who

failed to charge a continuing unfair labor practice at the first opportunity could for that reason later be barred from recovery, even when as in this case the severity of the practices drastically increased, would have dangerous consequences for national labor policy. Proceedings before the NLRB by a charging party involve substantial expense and often substantial risk of retaliation. Firms not yet seriously injured should not be compelled to risk a confrontation at the earliest possible moment for fear that if they do not they will thereafter be stripped of the protection of § 303(b).

ILA has also failed to suggest any facts indicating that it was in fact ignorant of the true state of affairs on the docks, or that it relied on an inaccurate version of events in adopting the Dublin Supplement. To the contrary, all of the evidence in the record suggests that ILA was very much aware that the Rules on Containers were *not* enforced.[14] Indeed, several sections of the Dublin Supplement are directed in so many words to the "evasion" or circumvention of the Rules on Containers. *See* Interpretive Bulletin No. 1, Interpretations 1.3-3, 1.6, 1.7, 1.8. ILA nowhere cites any information meeting the standards of Fed. R. Civ. P. 56(c) suggesting that it ever held, or acted upon, anything other than an accurate view of events.

Since there is no material issue of fact with respect to three of the four elements of an estoppel, we conclude that the equitable defense asserted by ILA would be legally insufficient to preclude the imposition of liability under § 303(b) and that the district court erred in denying summary judgment in order to explore it further. We hold, then, that the order appealed from, insofar as it denied a

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[14] *See, e.g.*, Letter of Thomas W. Gleason [President of the ILA] to James Dickman [President of NYSA] May 11, 1972. Joint App. 321a.

summary judgment of liability on Count III of the Conex and Twin complaints must be reversed.

V. The § 4 Clayton Claim

In Count I of their complaints Conex and Twin charge that the Dublin Supplement and the steps taken to implement it are a concerted refusal to deal, and thus a *per se* violation of the Sherman Act. While Count III seeks relief only against ILA, County I joins both union and employer defendants, all of whom, admitting both the agreement and the steps taken to implement it, assert several defenses to the antitrust claim, which we now consider.

A. The Labor Exemption

The principal defense tendered in opposition to summary judgment is that both the Rules and the Dublin Supplement are collective bargaining arrangements falling within the labor exemption to the antitrust laws. The defendants concede that both agreements involved concerted action between the ILA and the employer defendants, and hence are ineligible for the statutory antitrust exemptions provided in the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113. *UMW v. Pennington,* 381 U.S. 657, 661-62 (1965); *United States v. Hutcheson,* 312 U.S. 219, 232 (1941).

Thus the dispute is over the applicability of the so-called non-statutory labor exemption, defined by the Supreme Court in the series of cases beginning with *Apex Hosiery v. Leader,* 310 U.S. 469 (1940), and culminating in *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975). That dispute, in turn, presents two aspects: (1) whether the NLRB finding of violations of §§ 8(b)(4)(ii)(B) and 8(e) precludes relitigation of the illegality of the charged conduct as a matter of federal labor law; and (2) whether, assuming such ille-

gality, the nonstatutory labor exemption should nevertheless be available.

1. The Preclusive Effect of the NLRB Judgment On Labor Law Issues

In Part IV. A., *supra,* we held that ILA was estopped by the judgment in the NLRB unfair labor practice case from relitigating in the § 303(b) case the legality of the Dublin Supplement and the steps taken to implement it. To the extent that the undisputed facts and conclusions of law referred to in that Part are relevant on the availability of the labor exemption to ILA, our prior analysis is equally applicable. Moreover, NYSA, as the collective bargaining representative of the vessel owners and stevedores, was a party to the NLRB action, an appellant in the Second Circuit and an unsuccessful petitioner for certiorari in the Supreme Court. None of these defendants contend that they were so insufficiently represented before the Board that they should not be bound to the same extent as ILA by the resulting judgment.[15] Since both ILA and the employer defendants were represented before the NLRB and in the Court of Appeals in the Second Circuit, we hold that they are equally bound by the judgment, and estopped to contest the finding that their efforts to enforce the Rules were unfair labor practices. We reject, as well, appellees' contention that recognizing the issue preclusion effect of the NLRB decision deprives them of their seventh amendment right to a jury trial. *Parklane Hosiery Co. v. Shore, supra,* 47 U.S.L.W. at 4082 & n.19.

[15] The stevedore defendants do contend that as a matter of antitrust law the record on summary judgment is legally insufficient to bind them. That contention is discussed at Part IV. F, *infra.*

2. The Effect of the § 8(e) Violation upon the Availability of the Labor Exemption

We are faced, then, with the question whether a contract or combination, which has been adjudicated to be a violation of the prohibition in § 8(e) against contracts calling for secondary boycotts, can nevertheless be held to be within the nonstatutory antitrust exemption because it was negotiated as a part of a collective bargaining agreement.

Prior to 1959 it was an unfair labor practice under then § 8(b)(4)(A) of the National Labor Relations Act for a union to urge employees of an employer to refuse to perform work in order to compel their employer to cease doing business with a third party. That prohibition did not apply to employer refusals to deal that were embodied in collective bargaining agreements, however, and unions remained free to seek such agreements by collective bargaining, informational picketing or otherwise. *See Brotherhood of Carpenters v. NLRB,* 357 U.S. 93 (1958) (*Sand Door*). Congress concluded that these "hot cargo" agreements gave unions too much leverage against secondary parties, and in 1959 it amended § 8(b)(4), to prohibit coercion directed not only at employees of the primary employer, but also against the employer himself. It also added in § 8(e) a prohibition upon contracts obligating employers to refrain from doing business with third parties.[16] In *National Woodwork Manufacturers Ass'n v. NLRB, supra,* the Court narrowly construed the prohibitions in the 1959 amendments. Distinguishing *Allen Bradley Co. v. Local Union No. 3, IBEW,* 325 U.S. 797 (1945), as a case involving secondary boycott activity, the Court held that while secondary activity aimed at acquiring for

[16] Congress at the same time recognized that the special historical situation in the construction and apparel industries justified a limited exception to § 8(e) for those two industries. Those provisions are, of course, inapplicable here.

employers and union members work already being performed by third parties was prohibited, Congress did not intend the prohibition of work preservation clauses in collective bargaining agreements even though such clauses might fall within the literal terms of § 8(e). Indeed the Court explicitly recognized that the 1959 amendments made no change in the rule of *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), that work preservation is a mandatory subject of collective bargaining. 386 U.S. at 642. The determination whether a given demand went beyond the legitimate primary area of work preservation and into the forbidden secondary boycott area was said to involve in each instance a factual inquiry into all the surrounding circumstances. 386 U.S. at 644. Here the forum of choice, the NLRB, has made that factual inquiry and has determined that the Rules are directed not at work preservation, but at acquiring work from the employees of a secondary employer.

One consequence of the NLRB's decision is to foreclose the argument that the object of the agreement ultimately reached is a mandatory subject of collective bargaining, for an agreement that violates § 8(e) cannot meet that standard. The NLRB has stated that:

> the Act does not permit . . . the insistence, as a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.

National Maritime Union (Texaco Co.), 78 N.L.R.B. 971, 981-82 (1948), *enf'd,* 175 F.2d 686 (2d Cir. 1949), *cert. denied,* 338 U.S. 954 (1950). *See also NLRB v. Wooster Div., Borg Warner Corp.,* 356 U.S. 342, 360 (1958) (Harlan, J., concurring and dissenting).

A further consequence of the NLRB's factual determination, in the antitrust context, is suggested in Justice Brennan's *National Woodwork* discussion:

> In effect Congress, in enacting § 8(b)(4)(A) of the Act [the statutory predecessor of § 8(e)], returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co., supra,* and barred as a secondary boycott union activity directed against a neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere.

386 U.S. at 632. Justice Brennan's reference to *Duplex Printing Press Co. v. Deering,* 254 U.S. 443 (1921), and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n,* 274 U.S. 37 (1927), is to cases holding that despite § 20 of the Clayton Act a secondary boycott could be enjoined in a private action under the antitrust laws. The quoted dictum, although suggestive of the effect of a § 8(e) violation on the non-statutory antitrust exemption, is not decisive. Both *Duplex Printing* and *Bedford Cut Stone* were decided on statutory exemption grounds prior to the full emergence of the non-statutory exemption. But it must be kept in mind that §§ 8(b)(4) and 8(e), while housed in the National Labor Relations Act, are, like the Sherman Act, statutes reflecting the basic federal economic policy against restraints upon competition in the marketplace for goods and services as distinct from the labor market. Thus §§ 8(b)(4) and 8(e) reinforce rather than conflict with the basic policy of the antitrust laws, and suggest a cautious approach to the recognition of a non-statutory antitrust exemption for conduct in violation of their

prohibitions.[17] Nonetheless there remains room for the argument that even though ILA achieved at the bargaining table an object that is unlawful under §§ 8(b)(4)(ii)(B) and 8(e), and thus not a mandatory subject of collective bargaining, the non-statutory exemption should nevertheless apply.

The term non-statutory exemption, commonly used in discussing the interface between the often conflicting national antitrust and labor policies, is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market. The opinion generally credited as originating that construction of the antitrust laws is that of Chief Justice Stone in *Apex Hosiery Co. v. Leader, supra.* In that case, an organizational dispute erupted into a sit-in strike which stopped production, and halted the shipment of finished goods. The Court held this conduct exempt from the antitrust laws on two grounds. The union's goal, "elimination of price competition based on differences in labor standards . . .," was not "the kind of curtailment of price competition prohibited by the Sherman Act." 310 U.S. at 503-04. Moreover, Justice Stone held, there was no showing that the challenged restraint was "intended to have or in fact ha[d]" an effect upon the product market. *Id.* at 512. The Court thus distinguished *Duplex Printing Co.* (a classic secondary boycott) and *Bedford Cut Stone* (which involved a "refusal to handle" the primary's product) because in those cases the intent and effect of the conspiracy had been to restrain the product market by pressuring secondary parties to withdraw their patronage

[17] The Supreme Court has recently cautioned that all exemptions from the antitrust laws, including the labor exemption, are to be narrowly construed. Group Life & Health Insurance Co. v. Royal Drug Co., 47 U.S.L.W. 4203, 4210 (U.S. Feb. 27, 1979).

from the target manufacturer. *Id.* at 505-06. It would seem therefore that had such a secondary purpose and effect been shown, Sherman Act liability would have attached. *See also United States v. Hutcheson, supra,* 312 U.S. at 241-42 (Stone, C.J., concurring).

Apex Hosiery establishes two principles central to the subsequent development of the non-statutory exemption. First, the rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act. Second, restraints, like those in *Duplex Printing Co.* and *Bedford Cut Stone,* which are aimed at controlling a secondary product or service market are suspect, and are presumptively covered by the Sherman Act.

When the Court first had occasion to consider the application of the infant non-statutory exemption to a collective bargaining agreement, it might have taken the position that anything achieved as a result of collective bargaining with the primary employer was exempt from antitrust sanction. Such a course would have avoided many difficulties. In *Allen Bradley Co. v. Local No. 3, IBEW,* 325 U.S. 797 (1945), however, the Court took a different turn, holding that the distinction between union efforts aimed at the labor market and those aimed at the product market applied even to a collective bargaining agreement. In that case a union successfully negotiated, by legitimate means, refusal-to-deal clauses with local electrical equipment manufacturers and contractors. The union's success in obtaining those agreements created a product market cartel in the New York area, which in time came to look not only "to terms and conditions of employment but also to price and market control." *Id.* at 800. The union had actively assisted in policing and protecting that cartel.

When an excluded electrical manufacturer sued to enjoin union activities on behalf of the cartel, the union's participation in the illegal scheme was held to be an antitrust violation despite the collective bargaining context and despite the relationship of the restraints to wage and job stability. With the *Allen Bradley* decision faded any hope for a bright line between union activities exempt from and subject to the antitrust laws based on the existence of a collective bargaining relationship. The opinion, however, strongly reaffirmed the suggestion in *Apex Hosiery* that secondary product or service market restraints must meet a higher standard of justification to claim the antitrust exemption. *Cf. National Woodwork Manufacturers Ass'n v. NLRB, supra,* 386 U.S. at 628-630 (characterizing *Allen Bradley* as a secondary work acquisition scheme that would now be forbidden under § 8(e)).

Justice Black's opinion in *Allen Bradley* indicates that if a union coerced a refusal to deal clause, or some other clause having secondary market effects, solely in its own interest, and not in the interest of conspiring businessmen, the exemption applies. *See* 325 U.S. at 809-10. Under that reading of *Allen Bradley,* collective bargaining agreements might have been held exempt from Sherman Act scrutiny, regardless of their impact on the non-labor marketplace, absent a showing of an intent on the part of the union to join with employers in a larger Sherman Act conspiracy. And an appropriate test for whether the union was to be deemed to be acting solely in its own interest might well have been whether the subject matter of the agreement was a permissive or mandatory subject of collective bargaining.

In *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), the Court considered a collective bargaining agreement with a multi-employer unit of coal producers in which the union agreed with the employers in that unit to impose

the agreed-upon wage scale upon all coal producers with whom it had a collective bargaining relationship. The Union contended that since the agreement concerned wage standards, a quintessential labor market concern, it was exempt from the antitrust laws. Six Justices rejected that contention. Justice White, writing for three members of the Court, conceded that "wages lie at the very heart of those subjects about which employers and unions must bargain." 381 U.S. at 664. Recognizing that the union could unilaterally have adopted a uniform wage standard as a matter of bargaining policy, the Court held that the alleged agreement was not necessarily exempt. Justice White wrote:

> We think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.

381 U.S. at 665-66. He went on, however, to suggest that the unavailability of the exemption was not dependent upon a predatory intention on the part of the employers in the bargaining union.

> From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest

> but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy.

381 U.S. at 668.

Justice White's definition of the prohibited conduct is decidedly ambiguous. The first quoted excerpt seems to say that the antitrust evil is knowing union participation in an employer's conspiracy to eliminate competitors, a view consistent with some language in *Allen Bradley*. But the second passage suggests that the more serious evil, impinging upon both labor and antitrust policy, is the union's restriction of its freedom to deal with other competitor employers. That defect, Justice White suggested, remained "without regard to predatory intention or effect in the particular case." 381 U.S. at 668. This latter theme echoes the concern expressed in *Apex Hosiery* and *Allen Bradley* with agreements directed at secondary parties.

Citing Justice White's opinion, the plaintiffs argue that *Pennington* stands for the proposition that "an agreement which is tactically designed to achieve objectives outside the bargaining unit is not entitled to antitrust immunity." Plaintiffs' Brief at 38. This reads the *Pennington* holding too broadly. Although it is denominated the opinion of the Court, Justice White's *Pennington* opinion did not command a majority for his labor exemption discussion. In a concurring opinion Justice Douglas, writing for three Justices, expressly stated that as he read

Justice White's opinion, it "reaffirms the principles of *Allen Bradley* . . . ." 381 U.S. at 672. He suggested that on remand, the jury should be instructed that in order to find an antitrust violation, they must conclude *both* that the union agreed to press a wage scale that smaller employers could not pay, and that the agreement "was made for the purpose of forcing some employers out of business. . . ." *Id.* at 672-73. Elsewhere, he stressed that the "purpose" described earlier involves both "knowledge" that the minor manufacturers would be driven out of business, and "intent" to do so. *Id.* at 675. Since the three Justices who joined in the Douglas opinion would have upheld the union's claim of antitrust immunity absent a showing of predatory intent, and three others would have upheld the claim of immunity on broader grounds announced by Justice Goldberg, the Douglas opinion may well be read as limiting antitrust liability for agreements concerning subjects at the "very heart" of the collective bargaining process to cases where predatory intent can be shown. *Accord, Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (5th Cir. 1974) ("concerted purpose"); *Lewis v. Pennington*, 400 F.2d 806, 814 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968) ("predatory intent"); Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. Chi. L. Rev. 659, 720-21 (1965); 1 P. Areeda & D. Turner, *Antitrust Law*, ¶ 229e at 211 (1977). Such a standard would tend to insulate collective bargaining over subjects like wages, which are at the core of legitimate union concern, from the disrupting effect of potential antitrust sanctions. *See Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., supra*, 504 F.2d at 908; 1 P. Areeda & D. Turner, *supra*, ¶ 229e at 209-11.

If *Pennington* were the controlling precedent the plaintiffs' motion for summary judgment should properly have been denied. Assuming *arguendo* that the agreement here

concerned a subject at the "very heart" of the collective bargaining process, the affidavits suggest that in determining the intent of ILA and the employer defendants issues of fact remain. ILA avers that the sole purpose of the Dublin Supplement was to protect union job opportunities. The vessel owners say that they did not really want the acquired business, and that they therefore lacked the predatory intent required by *Pennington*. We are mindful that summary judgment is generally inappropriate in antitrust cases "where motive and intent play leading roles." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

A second line of authority, however, permits the imposition of antitrust liability without a showing of predatory intent. On the same day that *Pennington* was decided the Court handed down *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), which involved a multi-unit collective bargaining agreement in the food store industry. The agreement imposed on the entire bargaining unit a restriction on marketing hours, a direct restraint on the product market. Jewel Tea Company, a member of the unit, signed the agreement under protest but promptly brought an action for declaratory and injunctive relief against the union. It contended that the marketing hours restraint violated the Sherman Act because it limited the hours during which Jewel could compete with other meat retailers in the bargaining unit. The Court's judgment held that the agreement was exempt from the Sherman Act, but three opinions were filed, each receiving three votes. Justice White, announcing the judgment, in an opinion joined by Chief Justice Warren and Justice Brennan, said that for resraints on the product market, the test of exemption was whether the restraint:

> . . . is so intimately related to wages, hours and working conditions that the unions' successful attempt

> to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and its [sic] therefore exempt from the Sherman Act.

381 U.S. at 689-90 (footnote omitted). But if a union demanded, and an employer agreed to, an anticompetitive restraint designed to protect an interest not a mandatory subject of bargaining, White "seriously doubt[ed]" that the antitrust exemption would apply. *Id.* at 689. Relying on NLRB decisions holding that hours of work were a subject of mandatory bargaining, he then considered whether the restriction on hours of operation was justified by its close relationship to the union members' interest in avoiding night work. *Id.* at 692. The trial court had found that such operations would threaten that protected interest. Since that finding was not clearly erroneous, Justice White said that the agreement was exempt. *Id.* at 697.

Justice Goldberg, concurring in an opinion in which Justices Harlan and Stewart joined, proposed a test similar to, although somewhat broader than Justice White's. Goldberg would have held that "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." *Id.* at 710. He also observed that "decisions of the Labor Board as to what constitutes a subject of mandatory bargaining are, of course, very significant in determination of the applicability of the labor exemption." *Id.* at 710 n.18.

The six Justices comprising the *Jewel Tea* majority were thus agreed that when a collective bargaining agreement imposed restraints upon the employer's product market, the most significant issue in determining the availability of the labor exemption was whether the restraint involved a mandatory subject of collective bargaining.

Moreover Justice White's opinion suggests that the burden is on the union to demonstrate that the challenged product market restraint is in fact no broader than necessary to promote the union's interest in such a subject. Absent such a demonstration, the restraint must fall. *Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n,* 579 F.2d 484, 503 (Hufstedler, J., concurring and dissenting).

The Court's most recent pronouncement on the application of the Sherman Act in the labor context, *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975), is consistent with this analysis. In that case a labor organization coerced a general contractor into an agreement to hire only those subcontractors who had collective bargaining agreements with it. Like the Jewel Tea Company, the contractor sued to invalidate the agreement under the Sherman Act. The case did not involve a collective bargaining agreement, and so, as Justice Powell carefully noted, considerations peculiar to the collective bargaining context were absent. 421 U.S. at 625-26. Nonetheless, the Court analyzed the restraint in terms similar to *Jewel Tea*'s. It found that the goal of the agreement—the organization of non-union employers—was legitimate. But the agreement enacted in *Connell,* Powell held, reached too broadly, for it operated as a direct restraint upon the competition of non-union subcontractors, even if their competitive advantage was derived from efficiency rather than substandard wages and working conditions.

> This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

Id. at 625. Despite its explicit distinction of the collective bargaining situation, the *Connell* mode of analysis is similar to that of the *Jewel Tea* majority. The requirements for antitrust exemption are, first, that the market restraint advance a legitimate labor goal, and, second, that the agreement restrain trade no more than is necessary to achieve that goal. In addition *Connell* clarifies the relationship between unfair labor practice remedies under § 8(e) and treble damage actions under the antitrust laws. Local 100 had argued that the unfair labor practice remedies under § 10(*l*) and § 303 of the Act were exclusive and precluded a suit in antitrust based on a § 8(e) violation. The Court rejected this contention, stating that such remedies were available despite and in addition to the availability of Labor Act remedies. *Id.* at 633-34.

Were this an action for injunctive relief, we think that *Jewel Tea* and *Connell* would require a summary judgment rejecting the labor exemption. The anticompetitive effect of the enforcement of the Rules and the Dublin Supplement is on this record undisputed. By requiring that LCL and LTL containers be stripped at the dock, the Rules exerted a substantial upward pressure upon the price of container shipping. More important, the Boycott provisions of the Dublin Supplement led to the foreclosure of all LCL and LTL consolidators operating within the forbidden fifty mile range from the entire shipping market between the Port and Puerto Rico. This anticompetitive impact is significant and uncontested. These anticompetitive effects cannot now be justified by their advancement of legitimate labor goals. Six Justices in the *Jewel Tea* majority began the exemption inquiry by asking whether the subject matter of the challenged agreement was itself, or was clearly related to, a mandatory subject of collective bargaining. Whether one prefers the White or Goldberg formulations in *Jewel Tea,* under either a finding that the Rules were not a mandatory subject of bargaining effec-

tively undercuts any contention that they so "fall within the protection of the national labor policy," as to be completely exempt from antitrust scrutiny. *See, UMW v. Pennington,* 381 U.S. at 665 (White, J.); *Jewel Tea,* 381 U.S. at 689 (White, J.); 381 U.S. at 70 (Goldberg, J., dissenting) (all suggesting that whether a particular union demand is a mandatory subject of bargaining central to a determination of the scope of the labor exemption). Here, the NLRB has held that the Rules and the Dublin Supplement violated §§ 8(b)(4) and 8(e) of the Labor Act. Hence the "direct and overriding interest of unions" in mandatory subjects of bargaining, 381 U.S. at 732 (Goldberg, J., dissenting), is absent. Nor can it fairly be contended in the wake of that holding that the Rules are protected because they served a legitimate union interest. The NLRB has found that the object of the Rules was work acquisition, an activity that is condemned by national labor policy. *NLRB v. Enterprise Ass'n. of Pipefitters,* 429 U.S. 507, 529 n.16 (1976). As we noted above, *Apex Hosiery, Allen Bradley,* and *Nat'l Woodwork Manufacturers Ass'n* all indicate that illegal secondary activity of this kind is subject to Sherman Act sanctions.

Although no court has yet had occasion to hold that an NLRB finding of an unfair labor practice precludes recognition of complete non-statutory antitrust immunity, well reasoned decisions in other circuits support that conclusion. *See Mackey v. National Football League,* 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed,* 413 U.S. 801 (1977) (Lay, J.) ("federal labor policy is sufficiently implicated to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining."); *Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Electrical Contractors Ass'n.,* 579 F.2d 484, 503 (9th Cir. 1978), *cert. denied,* 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (Hufstedler, J., concurring and

dissenting). That result is also consistent with this court's decisions in *International Ass'n of Heat & Frost Insulators v. United Contractors' Ass'n,* 483 F.2d 384 (3d Cir. 1973), *modified,* 494 F.2d 1353 (3d Cir. 1974). *Heat Insulators* was an antitrust suit by AFL-CIO craft locals against a contractors' association and its assertedly "captive" union. Many of the charged antitrust violations, if proven, would also have been unfair labor practices. In the court's initial opinion, Judge Forman upheld the primary jurisdiction of the NLRB over those unfair labor practices. He stated that "if the allegations [of unfair labor practices] are true, then such acts would not be immune" under the labor exemption. 483 F.2d at 402. When informed that the Board had already heard the plaintiff's unfair labor practice charges and determined there was no labor law violation, the court vacated its opinion requiring that the district court certify the labor issues to the Board. But it recognized that the NLRB holding that the agreements were legal under the Labor Act was "not conclusive" on the issue of their illegality under the antitrust laws. 494 F.2d at 1354, *citing Meat Cutters v. Jewel Tea Co., supra.* Taken together the two opinions in *Heat Insulators* suggest that conduct illegal under federal labor law can claim no immunity from antitrust sanctions.

In support of the contrary position the appellees rely principally upon *Commerce Tankers Corp. v. National Maritime Union,* 553 F.2d 793 (2d Cir.), *cert. denied,* 434 U.S. 923 (1977). There, as here, a clause in a collective bargaining [sic] had been held to be in violation of § 8(e) in a prior NLRB proceeding. There, as here, the injured party argued that the NLRB's finding of illegality eliminated the antitrust exemption. The district court rejected the antitrust claim on another ground, and thus did not reach the immunity issue. On appeal, the district court's ground of decision was rejected by the Second Circuit. That court,

however, refused to rule that the § 8(e) violation eliminated the antitrust exemption, both because the district court had not considered the issue, and because only one party had briefed it on appeal. It did state in dictum that it did not think that the finding of a § 8(e) violation "necessarily determine[d]" the immunity issue, although it "le[nt] support to appellant's position." 553 F.2d at 802. The *Commerce Tankers* court's reasons for disposing of the exemption issue suggest that the holding does not have the force of a fully considered decision on the merits. Moreover, the *Commerce Tankers* opinion does not explain why the finding of a § 8(e) violation did not "necessarily determine" the exemption question. Judge Lumbard's cogent dissent, which argued a position similar to that adopted here, thus went unanswered. To the extent that *Commerce Tankers* may suggest the possibility that a § 8(e) violation may be completely exempt under the Sherman Act we find it unpersuasive.

Thus we hold that the enforcement of Rules and Dublin Supplement was not exempt under the Sherman Act. Those agreements are illegal under § 8(e), and under the tests of *Jewel Tea* and *Connell* could be enjoined. If this were an action for injunctive relief brought pursuant to § 16 of the Clayton Act an injunction against their prospective operation plainly would be required. That does not end the inquiry, however, for this is an action, not for prospective relief, but for money damages. As we noted above, the term non-statutory exemption describes an interpretation of the antitrust laws. Both primary and secondary authorities discussing the non-statutory exemption tend to assume that if a Sherman Act violation is shown, then all antitrust remedies are equally available. There is no *a priori* reason why this should be the case. If the Sherman Act itself can be interpreted to accommodate conflicting federal labor and antitrust policies Clayton Act § 4 can be

similarly interpreted. We think that a distinction between injunctive and treble damages remedies is warranted.

Where an action seeks only declaratory or injunctive relief, a finding that an agreement violates § 8(e) should always remove the antitrust exemption. Once it is clear that a § 8(e) violation has occurred no labor policy is advanced by permitting ongoing operation of an illegal contract, and injunctive relief pursuant to § 16 of the Clayton Act is appropriate. In considering the availability of § 4 relief, however, a more refined analysis is required. For while the agreement which resulted from the collective bargaining process may have been found to be illegal, it is possible that at the time when the negotiating session took place the parties reasonably believed that their agreement was directly related to the lawful goal of work preservation. That possibility raises a labor policy consideration which the Supreme Court has not yet addressed: the extent to which antitrust exemption should protect not only lawful labor agreements, but also the collective bargaining process. In our view, consideration of the competing public policies which may be implicated indicates the need to recognize a limited labor exemption defense to a claim for money damages under the Clayton Act for conduct which has been held to be illegal under federal labor law.

The decision in *Allen Bradley* not to exempt from antitrust remedies all collective bargaining agreements with a primary employer created a powerful potential sanction against both the union and the employer. Today this sanction provides both parties to the bargaining process with a strong incentive to take into account in their negotiations the public interest in competition in the secondary marketplace. Especially in oligopolistic industries—and Atlantic shipping is one—removing antitrust incentives entirely would place entirely too much uncontrolled economic

power in the hands of those at the bargaining table. But the question remains how much antitrust incentive is necessary to encourage the parties to the collective bargaining process to take into account anti-competitive injury to secondary parties. One possible answer is that the § 16 injunctive remedy, coupled with § 303 damage remedy against the union, and the NLRB's unfair labor practice jurisdiction is all the incentive that is required. We think not, however, for while those remedies may provide strong incentive for unions not to make excessive secondary demands, they provide very little incentive to employers to resist such demands. Employers may have no predatory purpose against secondary targets, but may nevertheless be quite willing to sacrifice in the bargaining process the interests of those targets in exchange for concessions on other bargaining issues. Since employers are not liable for damages under § 303, the only risk they would run from overwilling acquiescence in a bargained for § 8(e) violation would be that either in a § 10(*l*) or § 16 injunctive action they would be made to stop. That would give employers the best of all possible worlds at the collective bargaining table, since they would keep the benefit of the concessions bargained for on other issues, while the risk of economic injury to secondary targets would be borne by those targets and an often shallow pocket union. Complete removal from the bargaining equation of the § 4 incentive to employers to take into account injury to secondary targets would not, we think, be in the public interest.

Nor is there unfairness in requiring employers to resist excessive union claims. Employers are not, after all, without remedies against illegal demands. They can refuse to bargain and the Board will, we must presume, sustain that refusal to bargain. They can accede to the union demand, and then sue, as Jewel Tea Company and

Connell Construction Company did, to invalidate the agreement under federal law. Or they can simply refuse to implement the agreement, once adopted, because it is in violation of § 8(e). Any resulting strike pressure might then be enjoined as in violation of § 8(b)(4). We recognize that these remedies may not, in the short run, be as conducive to labor peace as acquiescence. But this court and others have recognized that affirmative obligations imposed by non-labor federal legislation may on occasion require an employer to resist illegal union demands even at the cost of a strike. *See Atlantic & Gulf Stevedores, Inc. v. OSHRC,* 534 F.2d 541 (3d Cir. 1976).

On the other hand, we recognize that a damage remedy is effective as a deterrent only when its application to an agreement can be foreseen by the parties at the time they are engaged in collective bargaining. Moreover, since the § 4 remedy, while in part compensatory, has a strong punitive element, it may seem harsh to apply it to conduct which the parties had no reason to believe would ever be held to be illegal, and may even have reasonably believed to be legally compelled. Concern about the lack of meaningful deterrence is particularly relevant when the determination of illegality results from an unanticipated shift in NLRB policy. Antitrust policy may not be significantly advanced by giving retroactive effect, in a damage action, to such unanticipated shifts in interpretation of §§ 8(b)(4) and 8(e). Thus it seems to us that there is room for a defense to a § 4 damage claim that would not be available in a § 16 injunctive action or a government injunctive action.

Casting the issue in terms of an exemption defense to a § 4 damage action affords an opportunity to strike a balance between the interest of parties to the collective bargaining process, and those of secondary targets. If we eliminate entirely the element of foreseeability, and allow a § 4 treble

damage recovery whenever the agreement is found to be illegal, the scales tilt too far away from the national interest in collective bargaining over arguably legitimate subject matters. If, on the other hand, we impose too low a burden on those asserting a lack of foreseeability defense, we risk slighting the national interest in deterring anticompetitive injury to secondary parties. The proper accommodation, we think, is recognition, in the collective bargaining context, of a defense to § 4 damage recovery involving several elements. Where, as here, a collective bargaining agreement, or conduct taken pursuant to it, has been shown to be illegal under federal labor law, a secondary party injured in his business or property by either has made out a prima facie case under § 4. At that point, to accommodate the labor policy favoring collective bargaining, the defendants may assert, first, that at the time they acted (here, the Dublin meeting and later) they could not reasonably have foreseen that the subject matter of the agreement being challenged would be held to be unlawful under § 8(b)(4) or § 8(e). If they fail to prove that the illegality determination was unforeseeable, the defendants should not be exempt from liability for damages under § 4. A successful showing that the determination of illegality was not reasonably foreseeable is not alone enough to establish an exemption defense, however, for *Jewel Tea* suggests that the defendants must also demonstrate that the contract provisions and steps taken to implement them were "intimately related" to the object of collective bargaining thought at the time to be legitimate, and went no further in imposing restraints in the secondary market than was reasonably necessary to accomplish it. Thus our test for the collective bargaining exemption defense to § 4 liability is conjunctive, and objective, and the defendants have the burden on all elements of going forward and of persuasion. The limited § 4 exemption defense we now recognize obviously is unavailable to defendants shown to have acted with the predatory intent

against secondary targets referred to in *Pennington* and *Allen Bradley*.

The district court did not consider the summary judgment record in light of the possible § 4 exemption defense we have posited. On this appeal it is inappropriate that we decide its availability, since neither the parties nor the district court focused on the fact issues possibly relevant to it. The defendants' burden of proving lack of foreseeability is formidable, considering the NLRB decision in *International Longshoremen's Assn., Local 1248 (U.S. Naval Supply Center)*, 195 N.L.R.B. 273 (1972), which held that the Rules were illegal over a year before the Dublin meeting. Nevertheless, they may be able to establish that a factfinder could believe that the *Naval Supply Center* warning should not have alerted reasonable collective bargainers to a § 8(b)(4) and § 8(e) risk. Moreover, while the provisions in the Dublin Supplement requiring the total withholding of containers from Conex and Twin seem overbroad when compared with the supposed ILA object of preserving the work of stuffing LCL and LTL freight originating with shippers close to the Port, it is at least conceivable that a convincing justification for all the boycott provisions of the Dublin Supplement can be successfully advanced. Thus a remand is required for the determination of the availability of the limited defense to § 4 liability which we have here announced. If the district court concludes that material issues of fact remain regarding both of its requirements, it may then proceed to a factual hearing. But whether the exemption defense to the § 4 claim is resolved summarily or after a hearing, it must be resolved in the first instance in the district court. A remand is therefore required.

B. The Claim of Per Se Illegality

If the Rules and Dublin Supplement are held to be nonexempt, the issue of the proper standard of antitrust

liability will arise. Conex and Twin contend that if the nonstatutory exemption is unavailable they are entitled to a summary judgment that the Sherman Act was violated. The district court, treating the questions of the labor exemption and the Sherman Act violation as "inseparable," denied it. We hold that the proper method of analysis is to determine the issue of nonstatutory labor exemption separately, as we have done, and then to proceed with conventional antitrust scrutiny of the complaint. The district court also assumed that even if the labor exemption was inapplicable the Rules and steps taken to enforce them must be judged, for antitrust purposes, under a rule of reason standard rather than, as Conex and Twin suggest, as a *per se* violation. The appellants argue that the Rules and Dublin Supplement comprised a *per se* illegal group boycott directed against the LCL and LTL consolidators. We agree.

The defendants suggest that the trend in the caselaw is to apply the "rule of reason" to concerted refusals to deal. Not all concerted refusals to deal have been held *per se* illegal. Yet in a core group of situations group boycotts have been held to be *per se* violations of the Sherman Act. The Court has condemned as *per se* violations: (1) horizontal combinations of traders at one level of distribution having the purpose of excluding direct competitors from the market, *e.g., Associated Press v. United States,* 326 U.S. 1 (1945); *Eastern States Retail Lumber Dealers' Ass'n v. United States,* 234 U.S. 600 (1914); (2) vertical combinations, designed to exclude from the market direct competitors of some members of the combination, *e.g., Klors, Inc. v. Broadway Hale Stores, Inc.,* 359 U.S. 207 (1959); and (3) coercive combinations aimed at influencing the trade practices of boycott victims. *E.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951); *Fashion Originators' Guild of America v. Federal Trade*

Commission, 312 U.S. 457 (1941). *See generally, E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee,* 467 F.2d 178 (5th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973); Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule,* 71 Nw. U.L. Rev. 818, 822-23 (1977).

The Rules and Dublin Supplement have horizontal, vertical, and coercive aspects. Under the Rules, the consolidators were required to accede to stuffing and stripping of their cargoes, and later were denied containers altogether. ILA, the vessel owners and the stevedores agreed to exclude the consolidators from providing services which compete directly with the stevedores and with those vessel owners who provide their own stevedoring services. The vessel owners and the stevedores have agreed with ILA to exclude from competition with ILA longshoremen the Teamster stuffers and strippers employed by the consolidators. The NLRB has determined that ILA's goal was "work acquisition." Where the work that the union seeks to acquire is being performed by the union's direct competitors, here the Teamsters, the union's efforts clearly were directed toward the elimination of Teamster competition. ILA, the vessel owners, and the stevedores agreed to coerce the consolidators into changing their method of operation by allowing their containers to be stuffed and stripped at the docks. In every aspect, the anticompetitive effect of this arrangement is clear. The Rules and the Dublin Supplement wholly bar the consolidators from providing their lower cost services to the shipping market between the Port and Puerto Rico. Nor is there any suggestion in the record that the application of the Rules will in the long run have procompetitive rather than anticompetitive effects. In sum, the Rules and Dublin Supplement are "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the in-

dustry is needed to establish their illegality." *Nat'l Society of Professional Eng'rs v. United States,* 435 U.S. 679 (1978).

The defendants also contend that a finding of *per se* illegality is not possible on this record because there is "no showing that the defendants had an anticompetitive intent to exclude plaintiffs from the market or to accomplish any other anticompetitive purpose." NYSA Brief at 43. They point out that the record contains evidence that the consolidators were valued customers of the carrier defendants, and that those defendants made a serious effort to maintain business relations with Conex and Twin even in the face of ILA resistance. The appellees' argument, however, does not accurately reflect the role of intent in civil antitrust cases. If a *per se* violation has been established, the court will already have found that "the nature and *necessary effect*" of the challenged conduct is "plainly anticompetitive." *National Society of Professional Eng'rs v. United States, supra,* 46 U.S.L.W. at 4359 (emphasis added). Once that fact has been established, all that need be shown is that the charged anticompetitive acts were in fact performed by the defendant. *United States v. United States Gypsum Co.,* 46 U.S.L.W. 4937, 4943 & n.18 (U.S. June 29, 1978). A showing of a specific intent to harm one's competitors or restrain competition need not be shown. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 614 (1953). Here the "necessary effect" of the container boycott was to drive the plaintiff consolidators from the New York to Puerto Rico shipping market. No further showing of intent is required.

In the alternative the appellees and the dissenting opinion urge that, at least in the context of labor agreements, the *per se* approach should never be applied. The principal support for that view is Professor Handler's statement that "[a] fair reading of *Jewel Tea* satisfie[d him]

that the court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust." Handler, *Labor and Antitrust: A Bit of History,* 40 Antitrust L.J. 233, 239-40 (1971). *See also Commerce Tankers v. National Maritime Union,* 553 F.2d 793, 802 n.8, 804 n.4 (2d Cir.), *cert. denied,* 434 U.S. 923 (1977). Mindful as we are of Professor Handler's expertise in both the labor and antitrust fields, we do not agree with his approach. Certainly we find no support for it in either the *Jewel Tea* or *Pennington* opinions. Indeed, the three groups of Justices in those cases, while they diverged widely on other issues, appear to have agreed that "settled antitrust principles" would be "appropriate and applicable" to activity found to be non-exempt. *United Mineworkers v. Pennington, supra,* 381 U.S. at 715 (Goldberg, J. dissenting); *Meatcutters v. Jewel Tea, supra,* 381 U.S. at 693 n.6 (White, J.); *id.* at 736-37 (Douglas, J. dissenting). Those "settled" principles include the *per se* rule, where the facts warrant its application. The Supreme Court's intimations thus do not support Professor Handler's view. Moreover, once a court has concluded that the labor exemption does not shield anticompetitive conduct, application of the rule of reason is redundant. The justification offered for application of the rule of reason is the need to recognize, in the antitrust context, labor's legitimate interest in the collective bargaining process. That interest, however, is precisely the same one that must be taken into account in determining the scope of the non-statutory labor exemption. A holding that the exemption does not apply embodies a judgment that considerations of labor policy are outweighed by the anticompetitive dangers posed by the challenged restraint. The proposed use of the rule of reason would, therefore, simply be an invitation to the court or jury to reweigh under a different label the question of the nonstatutory

exemption. The appellees have suggested no reason why a second such inquiry is necessary or appropriate.

Further, we think that reliance upon broad "public interest" considerations like the advancement of labor policy as a ground for application of the rule of reason is barred by the view of that rule adopted by the Court in *Nat'l Society of Professional Eng'rs v. United States, supra.* As the Court stated there:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. *Instead, it focuses directly on the challenged restraint's impact on competitive conditions.*

435 U.S. at 688 (emphasis added). Later in the opinion Justice Stevens repeated the same theme even more forcefully:

> [T]he purpose of both [rule of reason and *per se*] analysis is to form a judgment about the competitive signifiance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Id. at 692 (footnote omitted). Since the labor policy arguments advanced to support the application of the rule of reason do not relate to the pro-competitive impact of the Rules on Containers and the Dublin Supplement in the shipping market, they cannot remove this boycott from the category of *per se* violations.[18]

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[18] Even if the rule of reason were to be applied here, the parties have suggested no pro-competitive effects which would justify the challenged restraints under a rule of reason analysis.

Two additional points made by the dissent deserve comment. One is the suggestion that the Dublin Supplement is not a group boycott arrangement to which the *per se* rule should apply because "the union is not a competitor of the shipping association or the stevedoring companies." Dissenting Opinion at 65. That suggestion assumes that the *per se* ban on group boycotts applies only to horizontal competitors. *Klor's Inc. v. Broadway Hale Stores, Inc., supra,* disposes of the question, since Broadway Hale, like the ILA here, was not a competitor of the wholesaler parties with whom it conspired. Like the stevedores, however, Broadway Hale was a competitor of the boycott target. The dissent's other point is that by applying a *per se* rule to employee-labor union boycotts we are somehow giving the union lesser rights than political, religious, racial, or consumer groups which may try to advance their goals by boycott activity. Antitrust regulation of political or religious boycotts may raise important first amendment questions. *See* Note, *Political Boycott Activity and the First Amendment,* 91 Harv. L. Rev. 659 (1978). Those questions are absent here, just as they are absent when commercial organizations, which also have first amendment rights, step over the line drawn by Congress in the Sherman Act. In this case Congress has drawn the line between legitimate and illegitimate labor organization activities in §§ 8(b) and 8(e). We are not prepared to hold that those statutes violate the first amendment. Congress has made no similar statement of policy with respect to political or religious boycotts, and the application of a *per se* rule here is in no way analogous to its application in those contexts.

Thus we hold that the district court erred in rejecting the contention of Conex and Twin that the enforcement of the Dublin Supplement, if non-exempt, was a group boycott and a *per se* violation of the Sherman Act.

C. Election of Remedies

Faced with enforecement of the Dublin Supplement, Conex and Twin not only filed unfair practice charges with the NLRB, but also filed complaints with the Federal Maritime Commission (FMC) against the vessel owners seeking damages under § 22 of the Shipping Act of 1916, 46 U.S.C. § 821. The FMC complaints were voluntarily withdrawn without prejudice about the time the instant complaints were filed.[19] The appellees now argue that the filing of complaints with the FMC concerning the enforcement of the Dublin Supplement was an irrevocable election of remedies which as a matter of law bars their claim under the Clayton Act. Nothing in either the Shipping Act or the Clayton Act so provides.[20]

In support of their argument the defendants rely upon *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 224 (1966). There the Court held that although the FMC had jurisdiction over practices unlawful under the Shipping Act, that statute, unlike the Interstate Commerce Act, did not vest exclusive jurisdiction for reparations litigation in the administrative agency. The defendants in an antitrust suit had urged that by authorizing the FMC to approve conference shipping rates Congress had precluded the application of the antitrust laws to the shipping industry. The Court rejected this contention. Recognizing that a stay of the antitrust action might in some cases be

[19] Conex and Twin settled the FMC proceeding with TTT, the third vessel owner and dismissed the FMC complaint against it with prejudice. Twin settled its FMC complaint against Seatrain and dismissed its complaint with prejudice as to that defendant only. Whether Seatrain is entitled to a credit for whatever it paid in reparation for violations of the Shipping Act should Twin establish damage to its business or property is an issue not presented on this appeal.

[20] *Compare, e.g.,* The Interstate Commerce Act, 49 U.S.C. § 9.

appropriate while issues under the Shipping Act were litigated before the FMC, Chief Justice Warren wrote:

> Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act. This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice.

383 U.S. at 224. The appellees would have us read the last quoted sentence as establishing a rule that the FMC filing was an irrevocable election of remedies. But Chief Justice Warren neither said nor suggested any such rule, and no considerations of policy support it. The purposes of an election of remedies—prevention of double recovery, forum shopping, and harassment of defendants by dual proceedings—are adequately served by a rule that plaintiffs may not pursue both their Shipping Act and Clayton Act claims to a decision on the merits. *Cf. Abdallah v. Abdallah,* 359 F.2d 170, 175 (3d Cir. 1966). It would be both formalistic and unfair to hold that the filing and voluntary dismissal without prejudice of a complaint seeking Shipping Act reparations is a bar to the § 4 Clayton Act remedy, and we decline to do so.

D. Illegality

The vessel owners and stevedores join ILA in the assertion that because Conex and Twin lacked ICC permits they cannot recover damages. The reasoning of Part IV. C., *supra,* is applicable here, and will not be repeated. We do note, however, that the case for application of an illegality defense to the § 4 Clayton Act claim is by virtue of antitrust caselaw even weaker than that for its application under § 303(b). In *Perma Life Mufflers, Inc. v. Int'l Parts*

Corp., 392 U.S. 134 (1968), the Court held that the defense of *peri delicto* was not a bar to an antitrust suit by distributors challenging restrictive provisions in agreements to which they were parties, except when it could be said that the plaintiffs, acting in their own self interest, were equally responsible with the defendants for the antitrust violations. While *Perma Life* dealt only with illegality alleged to be a concurrent violation of the antitrust laws, it has been understood to have abolished the defense of illegality even when the plaintiff's wrongdoing is unrelated to antitrust policy. *E.g., Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425 (10th Cir. 1977) (absence of a liquor license); *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977) (absence of state and federal beer wholesaler permits); *Memorex Corp. v. IBM Corp.*, 555 F.2d 1379 (9th Cir. 1977) (theft of trade secrets); *Health Corp. of America, Inc. v. New Jersey Dental Ass'n*, 424 F. Supp. 931 (D. N.J. 1977), *mandamus denied without opinion sub nom. New Jersey Dental Ass'n v. Brotman*, No. 77-1268 (3d Cir. Feb. 24, 1977), *mandamus denied*, 434 U.S. 812 (1977) (violation of state health care regulations). *Contra, Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co.*, 440 F.2d 36 (10th Cir.), *cert. denied*, 404 U.S. 857 (1971).

The authorities rejecting illegality defenses not directly related to the antitrust policy in issue in the plaintiff's case recognize the inappropriateness of requiring that the federal antitrust enforcement policy yield to unrelated regulatory policies, state or federal. The ICC permit requirements, which so often are administered to protect existing carriers from excessive competition, have nothing to do with the pro-competitive policies of the antitrust laws. As we observed in Part IV.C., *supra*, the ICC has sanctioning authority for the vindication of the public policies which are its responsibility. Additional

enforcement at the expense of antitrust policy would not, in view of *Perma Life*, be appropriate.[21]

E. Equitable Estoppel

The vessel owners and stevedores join ILA in pleading equitable estoppel on the same theory that ILA asserts in defense to the § 303(b) count. For the reasons set forth in Part IV.D., *supra*, we hold that it is not a legally sufficient defense to Count I.

F. Nonparticipation of the Stevedore Defendants

The final defense to summary judgment, advanced only by the stevedore defendants, is that they should not be held liable for the adoption and enforcement of the Dublin Supplement, even though they are members of NYSA and are parties to the collective bargaining agreement with ILA, because the record does not contain the clear proof of their complicity required by § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106. Section 6, which applies both in civil and criminal actions, provides that:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

The "clear proof" standard has been applied by the Supreme Court in an antitrust enforcement context.

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[21] The appellees also rely on *Maltz v. Sax*, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943). We do not believe that holding survives *Perma Life*.

Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947).

We assume for purposes of this appeal that the acts complained of in Count I qualify as a labor dispute for purposes of § 6, and thus that the clear proof standard applies with respect to the authority of NYSA to act on behalf of the stevedores. As to other facts, such as the existence of a contract or combination, and the injury to the consolidators' business or property, the ordinary preponderance of the evidence test governs. *Ramsey v. United Mine Workers,* 401 U.S. 302, 308-11 (1971). But while § 6 binds the federal courts to a clear proof standard on the authority question, neither its text nor any judicial construction that has been called to our attention suggests that it precludes summary judgment on that question. Indeed the standard of Fed. R. Civ. P. 56(c)—the absence of a genuine issue as to any material fact—is higher than the clear proof standard imposed by § 6, which merely instructs the factfinder how to resolve genuine fact issues.

Contrary to the stevedores' argument, we find no genuine issue of material fact as to the authority of NYSA to act for them in negotiating and implementing the Dublin Supplement. All the stevedore defendants are members of NYSA and it bargains collectively on their behalf with ILA, which represents their longshoremen employees. The NYSA bylaws provide that any agreement negotiated by it is binding on all members unless within fourteen days members refuse to subscribe. The stevedores did not refuse to subscribe to, and thus became parties to, the Dublin Supplement. Any suggestion that they lacked knowledge of the charged group boycott is negated by the letter of April 13, 1973, directed to all NYSA members, including the stevedores, identifying Conex and Twin as violators of the Rules and activating the boycott provisions of the Dublin Supplement. No answering affidavits were submitted suggesting that either at the time of its execution or at the time of its implementation the stevedores took any action to disassociate themselves from the unlawful agreement to which they were parties. There is, therefore, no genuine issue of material fact as to the authority of NYSA to act for all its members, including the stevedores, in negotiating and implementing the contract undertaking a group boycott. The sole question is whether, having become a party to that contract with full knowledge of its contents, they are liable for the injury to the consolidators' business and property resulting from its implementation. We hold that they are.

VI. Conclusion

The order appealed from to the extent that it denied the motions of Conex and Twin for partial summary judgment of liability against ILA on Count III will be reversed, and the case remanded for the entry of such a judgment and for a trial on damages on that Count. Insofar as that order denied summary judgment on Count I against ILA, NYSA and the vessel owners it will be affirmed and the case will be remanded to the district court for further proceedings respecting the availability of the labor exemption defense to the § 4 Clayton Act claim which we have announced, and for a trial on damages on that Count if that defense should prove to be unavailing. Each party shall bear its own costs.

Weis, *Circuit Judge,* concurring and dissenting.

Although I concur with the majority's disposition of most of the issues in this case,[1] I am unable to agree that

[1] I do not dispute that collateral estoppel, to the extent it establishes violations of §§ 8(b)(4) and 8(e), is applicable here. I do

(footnote continued on following page)

on remand, if the challenged conduct is found to be non-exempt, a per se approach would be proper. Determining the applicability of the labor exemption and choosing the appropriate level of antitrust scrutiny are discrete issues. Accordingly, if it is concluded that the exemption does not apply, consideration must then be given to utilizing a full rule of reason inquiry or applying the abbreviated per se approach.

The fact that the labor exemption does not insulate certain conduct does not make it a violation of the antitrust laws, but simply means that the activity is subject to scrutiny under those statutes. This has been made clear by the Supreme Court decisions discussing the labor exemption. In each instance, the Court has carefully separated the exemption inquiry from the ultimate liability determination. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616, 637 (1975); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 693 (1965) (opinion of White, J.); *United Mine Workers v. Pennington,* 381 U.S. 657, 661, 669 (1965) (opinion of White, J.).

I start with the basic proposition that the rule of reason is the prevailing standard of analysis. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49 (1977); *Sitkin Smelting & Refining Co. v. FMC Corp.,* 575 F.2d 440, 446 (3d Cir. 1978), and that the per se standard is

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(footnote continued from preceding page)

not, however, agree with all of the dictum in the majority opinion. I note particularly that in International Bhd. of Teamsters v. Daniel, —— U.S. —— 47 U.S.L.W. 4135 (U.S. Jan. 16, 1979), the Supreme Court cautioned that the weight to be given an administrative agency's interpretation of the statute under which it operates must be limited by a court's obligation to honor the clear meaning of the legislation. I also read Parklane Hosiery Co. v. Shore, —— U.S. ——, 47 U.S.L.W. 4079 (U.S. Jan. 9, 1979), as permitting scrutiny of administrative procedures before according collateral estoppel effect to agency decisions.

applicable only in limited situations. As the Court explained in *Northern Pacific Railway v. United States,* 356 U.S. 1, 5 (1958):

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

The majority opinion correctly points out that some refusals to deal have been classified as per se violations. All of the cited cases, however, reviewed fact situations involving business competitors. The Supreme Court has never held that all boycotts, even those involving noncompetitors are per se violations, nor is there any present indication that that position will prevail.[2] Indeed, in *De Filippo v. Ford Motor Co.,* 516 F.2d 1313, 1317-18 (3d Cir. 1975), we cautioned that a consequence of an overreliance on the "boycott" label would be the indiscriminate extension of the per se principle. The case at bar does not represent a classic commercial boycott because the union is not a competitor of the shipping association or of the stevedoring companies. Its aim was not the elimination of competition but work preservation or acquisition. Concededly, a boycott may include noncompetitors and be a violation of the Clayton Act, but that does not answer the question whether a per se violation is involved. *See St.*

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[2] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), though emphasizing the anti-competitive focus of the rule of reason, was interpreting that very precept, not announcing a new per se classification. That opinion, therefore, is of no relevance in determining as an initial matter which mode of antitrust analysis to employ. *See generally* Handler, Antitrust—1978, 78 Colum. L. Rev. 1363, 1364-74 (1978).

Paul Fire & Marine Insurance Co. v. Barry, —— U.S. ——, 46 U.S.L.W. 4971 (U.S. June 29, 1978).[3]

A political, religious, racial, or consumer group that promotes a boycott of particular products to enforce its aims would not be guilty of a per se violation. In these cases, although the refusal to deal may be intended to inflict some injury upon the object of the boycott, the target is not a competitor of those who have actively urged the restraint. *See* L. Sullivan, Antitrust § 92 (1977); Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule,* 71 Nw. U.L. Rev. 818, 830-32 (1977). *See generally* McCormick, *Group Boycotts—Per Se or Not Per Se, That is the Question,* 7 Seton Hall L. Rev. 703 (1976).

The majority argues that permitting a rule of reason inquiry after a finding of no labor exemption would be redundant. But if a boycott by a political, religious, racial, or consumer group is to be subjected to rule of reason scrutiny, it is difficult to understand why that procedure should be denied a labor union simply because some—but not necessarily all—of the pertinent factors have been resolved in the labor exemption examination. The rule of reason analysis does not duplicate the exemption inquiry in its entirety and should not be forsaken merely because there might be some overlap. A union should not be singled out in a manner that would deny it all the opportunities for defense afforded other noncompetitor participants in similar boycotts. Indeed, I find myself in agreement with Professor Handler's view that an automatic finding of antitrust liability after a determination that union activity is nonexempt "would be a

[3] The courts of appeals have favored the rule of reason in noncompetitor boycott situations. *See* the cases collected in Smith v. Pro Football, Inc., —— F.2d —— (D.C. Cir. No. 76-2135 Nov. 9, 1978).

per se approach with a vengeance." Handler, *Labor and Antitrust: A Bit of History,* 40 Antitrust L.J. 233, 239 (1971). Moreover, some consideration should be given to the other defendants' contentions that the restraint was forced upon them through union pressure and not through any desire of their own.

Perhaps none of the defendants can satisfy the rule of reason analysis, but it is premature on this record to decide whether the restraint violates the antitrust laws. That determination must be made initially by the district court after reviewing all relevant considerations. A shortcut is not appropriate in this case. Accordingly, I would remand to the district court with directions that if the labor exemption is not found to be applicable, the rule of reason should be applied to the antitrust claims.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1529

CONSOLIDATED EXPRESS, INC.,
Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D.C. CIVIL No. 76-1645)

No. 78-1530

TWIN EXPRESS, INC.,
Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D.C. CIVIL No. 77-156)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix B—Judgment of Court of Appeals.

Present: SEITZ, *Chief Judge* and GIBBONS and WEIS, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on November 14, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court filed December 19, 1977, as amended by the order of the said District Court filed February 23, 1978, to the extent that the said order denied the motions of Conex and Twin for partial summary judgment of liability against ILA on Count III be, and the same is hereby reversed, and the cause remanded for entry of such a judgment and for a trial on damages on that Count. Insofar as the said order of the said District Court denied summary judgment on Count I against ILA, NYSA and the vessel owners, the said order be, and the same is hereby affirmed and the cause remanded to the said District Court for further proceedings respecting the availability of the labor exemption defense to the Section 4 Clayton Act claim which this Court has announced, and for a trial on damages on that Count if that defense should prove to be unavailing, all of the above in accordance with the opinion of this Court. Each party shall bear its own costs.

ATTEST:

THOMAS F. QUINN
Clerk

April 16, 1979

APPENDIX C

Opinion of District Court.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-1645

CONSOLIDATED EXPRESS, INC.,

Appellant,

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

Civil Action No. 77-156

TWIN EXPRESS, INC.,

Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN W. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; and UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

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(Filed Dec. 19, 1977, as amended May 11, 1978)

STERN, *District Judge*

I. INTRODUCTION

In this lawsuit, plaintiff Consolidated Express (hereinafter Conex) seeks to recover money damages for injuries it claims to have suffered by reason of the implementation of the infamous 1969 Rules on Containers, a collectively-bargained response to the perceived threat to waterfront labor posed by technological change in the shipping industry.[1]

Since World War II, the introduction of increasingly large containers has enabled the shipping industry gradually to replace piece-by-piece loading and unloading work performed by the longshoremen on the piers with block handling of cargo. By use of mammoth containers, shipments of diverse firms can be consolidated into one container which can be "stuffed" far from the waterfront. The containers are then sent to the piers where they are loaded onto waiting ships. This innovation has increased productivity, but has produced decline in demand for the services of the members of the defendant International Longshoremen's Association (ILA).

In 1958, the ILA protested the use of containers and commenced a strike against defendant New York Shipping Association (NYSA). In the contract adopted in 1959, the

[1] A complaint has also been filed by Twin Express, Inc., against the same defendants (except Twin does not sue Seatrain) arising out of the same facts. The suits have been consolidated for trial on the issue of liability. Twin has joined in Conex's motion for summary judgment, and both plaintiffs and all defendants have agreed to be bound by the Court's determination of this motion. Twin, like Conex, is a consolidator and corporation of Puerto Rico. Although the discussion in the text will refer to Conex, it applies equally to the Twin suit, unless otherwise noted.

union conceded that "any employer shall have the right to use any and all types of containers without restrictions."[2]

In the following decade, fully containerized ships were introduced and the use of containers increased dramatically. The loss of work opportunities occasioned by these developments led the ILA to negotiate the "Rules of Containers" in 1969. By these agreements, the NYSA guaranteed that all cargo lots which had been of less than a container size but which had been consolidated with other lots into one container would be stripped when the container arrived on the docks by longshoremen on the dock, if the cargo had originated from or was to be shipped to a point within 50 miles of the dock. The Rules provided for a penalty against the carrier in the amount of $250 per container for any container which went through dockside without being

[2] Section 8 of the 1959 memorandum of settlement was entitled "Containers-Dravo Size or Larger" and provided:

> a. Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.
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> b. The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached shall submit to arbitration . . . the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.
>
> c. Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

Notwithstanding this concession, union objections to container use continued and there is much support in the record for the view that containers did not move freely through the ports. See Affidavit of James M. Dickman, Apr. 12, 1977; Affidavit of Thomas W. Gleason, May 1, 1977.

stripped and stuffed in accordance with the Rules.[3] In 1970, the penalty was increased to $1,000 per violation. Disputes continued and, in 1973, CONASA (an organization of shipping associations, including NYSA, with authority to negotiate) and the ILA met and entered into the "Dublin Supplement" which provides, in part, as follows:

Enforcement of Rules on Containers.

* * *

1. (a) All outbound (export) consolidated or LTL container loads (Rule 1 containers) shall be stripped from the container at pier by deepsea ILA labor and cargo shall be stuffed into a different container for loading aboard ship.

1. (b) All inbound (import) consolidated or LTL cargo (Rule 1 containers) for distribution shall be

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[3] "Rules on Containers":

"Rule 1. Definitions and rule as to containers covered.

"Stuffing—Means the act of placing cargo into a container.

"Stripping—Means the act of removing cargo from a container.

"Loading—Means the act of placing containers aboard a vessel.

"Discharging—Means the act of removing containers from a vessel.

"These provisions relate solely to containers meeting each and all of the following criteria:

"(a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.

"(b) Such containers which come from or go to any person (including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

(Footnote continued on following page)

stripped from the container and the cargo placed on the pier where it will be delivered and picked up by each consignee.

2. No carrier or direct employer shall supply its containers to any facilities operated in violation of the

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"(c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

"Rule 2. Rule of stripping and stuffing applies to such containers.

"A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or Consolidated Container loads of mail, of household goods with no other type of cargo in the container, and of personnel effects of military personnel shall be exempt from the rule of stripping and stuffing.

"Rule 3. Rules on No Avoidance or Evasion.

* * *

"(c) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint Container Royalty Fund liquidated damages of $250 per container which should have been stuffed or stripped. Such damages shall be used for the same purposes as the first Container Royalty is used in each port. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in (g) below, the ILA shall have the right to stop working such carrier containers until such damages are paid."

Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or a distributor. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.

A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.

Consolidated Express, a Puerto Rican corporation, is a non-vessel owning common carrier engaged in the business of containerizing less than container load (LCL) or less than trailer load (LTL) cargo for shipment between Puerto Rico and its inland facilities located within 50 miles of the Port of New York. In the trade, plaintiff is known as a "consolidator," that is, it is in the business of handling LCL or LTL goods for customers wishing to ship such goods. Consolidators "unitize" or consolidate the crates of several customers into large containers provided by the shipping companies. The consolidators pack their customers' crates into containers, and then truck them to pierside facilities where they are loaded onto ships.

Defendant New York Shipping Association is an association of employers engaged in various operations related to the shipment of freight into and out of the Port of New York. On behalf of its member-employees, NYSA conducts collective bargaining negotiations and enters into collective bargaining agreements with labor organizations, including

defendant ILA which represents the employees of NYSA's member employers. Defendants Sea-Land and Seatrain are common carriers by water. As part of their business, they furnish containers and trailers, terminal facilities, and cargo space on vessels which they own or lease. They are also in the business of providing stevedoring services for cargo shipped aboard their vessels. Such services include loading and unloading cargo on and off their vessels and receiving delivery of cargo at dockside.

Defendants International Terminal Operating Co., Inc., John M. McGrath Corp., Pittston Stevedoring Corp., United Terminal Corp., and Universal Maritime Services Corp. are members of the NYSA. Each is engaged, in part, in the business of providing stevedoring services as described above.

On June 1, 1973, Conex filed charges with the National Labor Relations Board alleging that the ILA had violated § 8(b)(4)(ii)(B) of the National Labor Relations Act, which forbids union activity which forces any employer "to cease doing business"[4] with any other employer, and

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[4] Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(ii)(B), provides in pertinent part:

> (b) It shall be an unfair labor practice for a labor organization or its agent—
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>
> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is—
>
> (B) Forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . Provided that nothing contained in Clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

that the ILA and NYSA had violated § 8(e)[5] which prohibits agreements requiring such a cessation. Complaints issued and the General Counsel, pursuant to § 10(l) sought preliminary injunctive relief against the union and the shipping association.

The complaint came before Judge Lacey who granted the petition for a preliminary injunction. *Balicer v. ILA,* 364 F.Supp. 205 (D.N.J. 1973). Testimony of nine witnesses before Judge Lacey consumed seven days and 1,200 pages of transcript.[6] Noting the limited role of the Court in a 10(l) proceeding, Judge Lacey held that the NLRB's legal theory—that the challenged activities were impermissible work reacquisition—was substantial, and that the issuance of a temporary injunction was "just and proper." The Court of Appeals for the Third Circuit affirmed. *Balicer v. ILA,* 491 F.2d 748 (3rd Cir. 1973) (mem.).

The case was then submitted to an Administrative Law Judge on the basis of a stipulated record consisting of the record of the injunction proceeding before Judge Lacey, including extensive documentary evidence, and supplementary affidavits. The Administrative Law Judge determined that the ILA boycott of Conex and the contractual

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[5] Section 8(e), 29 U.S.C. § 158(e) (1970) reads, in pertinent part:

> It shall be an unfair labor practice for any labor organization to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person.

[6] Called as witnesses for NYSA were its president, James J. Dickman; the vice-president in charge of operations of ITT (a NYSA member with whom Conex has settled its claims); Sea-Land's manager of cargo operations; NYSA's administrative director; and Sea-Land's chairman of the board and chief executive officer. The ILA called Thomas Gleason, its international president since 1963, and in the industry since 1915.

agreement between the union and the shipping association were addressed to the labor-management relations of the NYSA employer-members vis-a-vis their own employees. He held that the activities were therefore protected "primary conduct."

The NLRB reversed. *Consolidated Express, Inc.,* 221 NLRB No. 144 (1975). The Board found the agreement to be improper under § 8(e) because its objective was to force the NYSA to cease doing business with the consolidators. The NLRB rejected the argument that the contract constituted a valid effort by the ILA to preserve for its members a type of work which they had historically performed. It reasoned that the "work in controversy" was that work performed by the consolidators at their off-pier facilities, not the traditional cargo handling done at dockside by longshoremen. The agreement thus could not be viewed as work preservation lawful under the Supreme Court decision in *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed. 2d 357 (1967). Moreover, reasoned the Board, even assuming that the ILA once had a valid claim to the strip and stuff work, that claim had been abandoned in the 1959 ILA-NYSA agreement. Finally, the Board considered the "economic personality of the industry" and noted that the absence of a clear distinction between strip and stuff work and the work related to preparing containers for shipment could lead to a future ILA claim to all such work with "enormous impact on the shipping industry". The Board further ruled that the union's actions in enforcing the agreement were unfair labor practices under § 8(b)(4b)(ii)(B).

The Court of Appeals for the Second Circuit found that the Board's order was supported by substantial evidence and sustained it. *ILA* v. *NLRB,* 537 F.2d 706 (2nd Cir. 1976), *cert. denied,* 429 U.S. 1041, 97 S.Ct. 740, 50 L.Ed. 2d 753 (1977). Judge Wyzanski, writing for the Court, prem-

ised enforcement of the order on the Board's finding that there was no valid work preservation agreement.[7] It is against this backdrop that plaintiff's motion for summary judgment must be evaluated.

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[7] The critical portion of the Second Circuit opinion reads as follows:

> The following parts of [the NLRB] opinion seem to us controlling and convincing.
>
> > . . . the disposition of this case turns on whether ILA's activities and its contractual agreements with NYSA had primary or secondary objectives. If ILA's activities and its agreements with NYSA were designed to preserve work to which ILA-represented employees working in the Port of New York were entitled, then both the activities and the contractual arrangements would be primary in purpose and, therefore, would not be unlawful. However, if ILA's real object was to obtain either work traditionally performed by employees not represented by ILA or work to which ILA had abandoned all claims, then the pressures on NYSA members and the contractual arrangements would have a secondary object and would violate Section 8(b)(4)(ii)(B) and 8(e), respectively. As the United States Supreme Court instructed in National Woodwork Manufacturers Association v. N.L.R.B., "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees."
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> * * *
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> . . . in order to properly evaluate the validity of ILA's claim to the work, "it is essential to define with some precision the work in controversy since that is the predicate upon which the issue of work preservation must turn." It is clear from the record that the work in controversy here is the LCL and LTL container work performed by Consolidated and Twin at their own off-pier premises. It is with this precise work in mind that the contentions of the parties must be evaluated.
>
> The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.
>
> Similarly, for many years, maritime cargo has been

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Plaintiff has moved for partial summary judgment on the issue of defendants' liability under Counts I and III of the complaint. Count I charges all defendants with a group

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> sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in use, these consolidating companies, such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship. Furthermore, they perform this consolidation work at their own off-pier premises, with their own employees who are outside the unit represented by ILA, and who fall within the coverage of separate collective-bargaining agreements, under which they are represented by other labor organizations. It is clear, therefore, that Consolidated and Twin have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy.
>
> From the foregoing and the record as a whole, it is clear that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises. It does not fall within ILA's traditional role to engage in make-work measures by insisting upon stripping and stuffing cargo merely because that cargo was originally containerized by nonunit personnel. Yet, ILA's demands here could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA.

Judge Feinberg dissented, arguing that the Board had erred in identifying the work in controversy. He maintained that the work which could be preserved without violating 8(e) must be defined as the generic category of preparation of cargo for shipment, not as the specific tasks currently being performed by the longshoremen. In his view, under the Board's and the majority theory, work preservation agreements would be virtually precluded where it could be established that other employees at other sites were doing or had done the work for which protection was sought.

boycott or concerted refusal to deal, alleged to be *per se* violations of §§ 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1 and 3. Count III seeks damages against defendant ILA under § 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187(b) for its violation of § 303(a) of that Act, 29 U.S.C. § 187(a).

In brief, plaintiff argues that the 1975 determination by the National Labor Relations Board that the Rules on Containers and the enforcement thereof constituted unfair labor practices be given collateral estoppel effect and that the Board's determination is dispositive of all issues raised in this lawsuit. All defendants oppose the application of collateral estoppel in the context of this lawsuit and assert a number of affirmative defenses. Plaintiff insists that each and every defense is insufficient as a matter of law.

II. Count III—Unfair Labor Practice Claim

Under Count III, plaintiff seeks damages from the ILA under § 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187(b) for its violations of § 303(a) of that Act, 29 U.S.C. § 187(a). Section 303 provides:

> (a) It shall be unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title [§ 8(b)(4) of the NLRA].
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) . . . may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(ii)(B), provides, in pertinent part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . .
>
> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is—
>
> (B) Forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other person, . . . Provided that nothing contained in this Clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

Conex maintains that the union's commission of an unfair labor practice within the meaning of § 8(b)(4) was established in the NLRB proceedings and that the ILA is collaterally estopped from relitigating the facts underlying the Board's determination or the legal conclusions which it reached. The ILA argues that collateral estoppel does not apply under the circumstances present in this case. It also argues that plaintiff's own illegal activities preclude recovery. It contends that Conex's claims are barred by the statute of limitations. And it raises a number of equitable defenses.

A. Collateral Estoppel

The parties agree that *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966) establishes the criteria for application of the doctrine of collateral estoppel to an administrative determination. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact

properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Id.*, at 422, 86 S.Ct., at 1560.

Section 303(a) of the Labor Management Relations Act requires a determination of whether the ILA committed an unfair labor practice within the meaning of § 8(b)(4) of the NLRA. *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 72 S.Ct. 235, 96 L.Ed. 275 (1952). The NLRB ruled that the ILA had committed such a forbidden practice. ILA argues, however, that that conclusion should not be binding here. I disagree.

The major thrust of the union's argument is that it did not receive a full and fair hearing before the Board because it was afforded no discovery rights in the Board's proceedings. Acceptance of this theory would, in effect, mean that collateral estoppel could never be applied to an administrative determination; discovery under the federal rules is never available on the administrative level. Moreover, in the context of this litigation, the ILA's claim is particularly unpersuasive. At the lengthy hearing before Judge Lacey, the ILA was represented by counsel and had a full opportunity to call, examine, and cross-examine witnesses and to introduce documentary evidence. As augmented by affidavits, and by agreement of the parties, this was the record upon which the Board made its determination. Appeal of the Board's decision was prosecuted vigorously. Under these circumstances, I must conclude that the ILA had a full and fair opportunity to litigate its claims.

Its contention that "newly discovered evidence" compels a different resolution of the substantive issue is unpersuasive. Even if a different conclusion could be reached if the ILA were permitted a second chance, the policies underlying the doctrine of collateral estoppel—finality to litigation, prevention of needless litigation, avoidance of

unnecessary expenditures of time and money, undesirability of inconsistent adjudications—outweigh the considerations raised by the union. As the Supreme Court has stated:

> After a party has had his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

Stoll v. Gottlieb, 305 U.S. 165, 172, 59 S.Ct. 134, 138, 83 L.Ed. 104 (1938).[8]

The Board's determination that the union had committed an unfair labor practice will therefore be given collateral estoppel effect for purposes of the plaintiff's Section 303 claim.[9] See *International Wire v. Local 38, IBEW*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867, 94 S.Ct.

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[8] The NLRB's definition of the work in controversy, approved by the Second Circuit, has come under critical attack. See Note, *Work Recapture Agreements and Secondary Boycotts: ILA v. NLRB (Consolidated Express)*, 90 Harv.L.Rev. 815 (1977) ("The narrow view adopted in *Consolidated Express, Inc.* would restrict the collective bargaining process, thereby limiting its potential to ease the economic and social tension which accompany technological change.")

The Third Circuit has expressly declined to comment on the validity of the Rules in this Circuit. See *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 552 F.2d 985 n.5 (3rd Cir. 1977).

[9] ILA charges that the Board's decision was motivated by policy considerations, rather than legal analysis. The Second Circuit, however, expressly based its enforcement of the Board's order on the sufficiency of the record to support the conclusion that the Rules on Containers had no valid work preservation objective. That Court expressly disavowed the Board's "policy" rationale. Moreover, it rejected the Board's finding with respect to "abandonment"—the subject to which the ILA's newly discovered evidence relates.

63, 38 L.Ed.2d 86 (1973); *Texaco Inc. v. Operative Plasterers & Cement Masons International Union,* 472 F.2d 594 (5th Cir.), *cert. denied,* 414 U.S. 1091, 94 S.Ct. 721, 38 L.Ed.2d 548 (1973); *Paramount Transport Systems v. Teamsters Local 150,* 436 F.2d 1064 (9th Cir. 1971); *Painters District Council No. 38 v. Edgewood Contracting Co.,* 416 F.2d 1081 (5th Cir. 1969); *Eazor Express, Inc. v. General Teamsters Local 326,* 388 F.Supp. 1264 (D.Del. 1975); *United Engineers and Constructors, Inc. v. International Brotherhood of Teamsters,* 363 F.Supp. 845 (D.N.J. 1973).

B. Section 303(b) Illegality Defense.

The ILA argues that plaintiff's own wrongdoing bars recovery on its § 303(b) claim. The asserted defense is based on allegations that, during the relevant time period, plaintiff operated as a freight forwarder[10] without holding the license required under Part IV of the Interstate Commerce Act, 49 U.S.C. §§ 1001 *et seq.* Conex, for purposes of this motion, does not deny that it was operating as a freight forwarder without a license.[11] It argues in-

[10] The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title. 49 U.S.C. § 1002(a)(5).

[11] 49 U.S.C. § 1010 provides, in pertinent part,

(a)(1) No person shall engage in service subject to this chap-

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stead that the defense of "illegality" is insufficient as a matter of law.

It is well settled that a charging party's violation of an unrelated statute is *not* a defense to the secondary boycott prohibitions of § 8(b)(4)(ii)(B). See, *e.g., NLRB v. Springfield Building & Construction Trades Council,* 262 F.2d 494 (1st Cir. 1958). But a non-defense before the Board is not necessarily a non-defense to a § 303 private damage claim.

Section 303(b) reads, in pertinent part:

> whoever shall be injured in his business or property . . . shall recover the damages by him sustained.

Although the damage action may tend collaterally to serve as a deterrent, Section 303(b) is purely compensatory in nature. See *Teamsters Local 20 v. Morton,* 377

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> ter unless such person holds a permit, issued by the Commission, authorizing such service . . .
>
> (3)(c) The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; . . .

According to the defendants, Conex applied for authority to provide freight forwarding services, but its application was denied by the Interstate Commerce Commission in January of 1971. The Commission's denial was based on Conex's failure to establish that its proposed services would be consistent with the public interest and the national transportation policy. The Commission also indicated that Conex was engaged in services without the required ICC authority. Consolidated Express, Inc., Freight Forwarder Application, ICC Docket FF-384 (Jan. 19, 1971). Exhibit 6 to Benkhardt Affidavit.

The record suggests that Twin Express never applied for an ICC license.

U.S. 252, 260, 84 S.Ct. 1253, 12 L.Ed. 2d 280 (1964); *Sheet Metal Workers, Local 233 v. Atlas Sheet Metal Co.,* 384 F.2d 101 (5th Cir. 1967).

If, as the ILA maintains, Conex's entire freight forwarding business is and was unlawful, Conex would have been, in legal contemplation, incapable of suffering any injury to its "business" by reason of the ILA's unfair labor practices. In slightly different terms, Conex, nonexistent in the eyes of the law, is entitled to no legal protection. Its contracts made in violation of the Interstate Commerce Act would be void and unenforceable. See *Shirks Motor Express Corp. v. Forster T & R Co.,* 214 Md. 18, 133 A.2d 59 (Md. Ct. App. 1957).

Whether the issue is framed in terms of an illegality defense or a lack of standing to sue, the ILA's uncontradicted allegations that Conex was operating in flagrant violation of federal licensing law preclude a grant of summary judgment on the issue of liability under Section 303.

C. Statute of Limitations.

Defendant ILA has also raised a number of issues relating to statute of limitations. Both sides agree that, because Section 303 contains no statute of limitations, state law applies. See *Hyatt Chalet Motels, Inc. v. Carpenters Local 1065,* 430 F.2d 1119 (9th Cir. 1970); *International Union of Operating Engineers v. Fischbach & Moore, Inc.,* 350 F.2d 936 (9th Cir. 1965); *United Mine Workers v. Meadow Creek Coal Co., Inc.,* 263 F.2d 52 (6th Cir.), *cert. denied,* 359 U.S. 1013, 79 S.Ct. 1149, 3 L.Ed. 2d 1038 (1959). Moreover, both sides agree that state law means the law of the forum state, that is, of New Jersey. See *UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed. 2d 192 (1966). At this point, concensus [sic] ends.

The ILA argues that application of state law means application of the whole law of New Jersey, including its choice of law rules. The ILA contends that New Jersey

choice of law principles mandate application of Puerto Rico's one-year statute of limitations. Plaintiff, on the other hand, urges that application of state law in this context means application only of the internal law of the state and that, even if New Jersey choice of law principles are deemed applicable, they dictate choice of New Jersey's own six-year limitations period.

Whether in federal question cases, where the court is referred to state law, the state's choice of law rules must also be applied is a question to which the Supreme Court has alluded, but which it has never resolved. See, *e.g., UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 705 n.8, 86 S.Ct. 1107, 16 L.Ed. 2d 192 (1966); *De Sylva v. Ballentine,* 351 U.S. 570, 76 S.Ct. 974, 100 L.Ed. 1415 (1956); *McKenzie v. Irving Trust Co.,* 323 U.S. 365, 371 n.2, 65 S.Ct. 405, 89 L.Ed. 305 (1945); *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). Some courts faced with the issue have resolved it simply by citation to *Klaxon Co. v. Stentor Elec. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). See, *e.g., Robbins v. Bostian,* 138 F.2d 622 (8th Cir. 1943). But language in a number of Supreme Court cases suggests that *Klaxon* has no relevance. *Levinson v. Deupree,* 345 U.S. 648, 651, 73 S.Ct. 914, 97 L.Ed. 1319 (1953); *Holmberg v. Armbrecht,* 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946). See also *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 471-472, 62 S.Ct. 676, 86 L.Ed. 956 (1942) (Jackson, J. concurring).

Klaxon holds that a federal court in a diversity case is bound to follow the choice of law rules of the forum state. In diversity cases, the federal court sits as a state court, and the *Klaxon* rule insures fulfillment of the uniformity principle declared in *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The considerations underlying the *Klaxon* rule have little or no relevance in the federal question context. In such cases, state limitations are applied only to fill a void. In failing to enact its own limitations period,

> Congress could not have intended an unlimited period for enforcement as would otherwise exist in actions at law, and that, selection of a period of years not being the kind of thing judges do, federal judges should borrow the limitation[s] statute of the states where they sit. . . . In this area, as contrasted with diversity litigation, federal interests transcend those of the states; state limitation statutes and doctrines are utilized to effect federal, not state, policy [sic]
>
> . . . . .

Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83-84 (2nd Cir. 1961).

Application of state choice of law principles where the issue is the limitations period for commencement of a federal cause of action furthers no federal interests. On the contrary, modern choice of law principles, like New Jersey's interest analysis, have been developed to insure that in cases where there are multi-state factual contacts and where the legal issues will be resolved on the basis of state substantive law, the policies of all potentially interested states will be furthered or, at minimum, not frustrated. See, *e.g., Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28 (3rd Cir. 1975); *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967); *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970). In the instant case, however, the interests we seek to protect are federal ones which state choice of law principles are not designed to further.[12]

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[12] However, the Supreme Court has stated that, in choosing between two arguably applicable limitations statutes of the forum state

> there is no reason to reject the characterization that state law would impose unless the characterization is unreasonable or inconsistent with national labor policy.

UAW v. Hoosier Cardinal Corp., supra, 383 U.S., at 706, 86 S.Ct., at 1113 (1966).

(footnote continued on following page)

Accordingly, I hold that New Jersey's own six-year limitation applies and that the cause is not timebarred.

D. Accrual, Laches and Estoppel En Pais.

Defendant ILA also contends that plaintiff's cause of action accrued in 1969 when the Rules on Containers were first promulgated. Thus it argues that the action is timebarred even under New Jersey's six-year limitations statute. Both plaintiff and the ILA cite *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) as controlling. *Zenith*, an action involving Sherman and Clayton Act claims, sets forth the general rule on accrual of actions.

> The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is "commenced within four years after the cause of action accrued," 15 U.S.C. § 15(b), plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy to violate the antitrust laws,

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(footnote continued from preceding page)

Where the forum state itself has several limitations of statutes, the court has no option but to choose among them. However, choosing among limitations periods of several states according to the forum's choice of law principles introduces a host of unnecessary complexities. State choice of law rules for selection of an appropriate statute of limitations are explored in *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 140-141, 305 A.2d 412 (1970), and *Allen v. Volkswagen of America, Inc.*, 555 F.2d 361 (3rd Cir. 1977). Attempting to apply these rules where the cause of action is federal is like fitting a round peg in a square hole. The most sensible thing to do, if the case law would permit it, would be for the federal courts to develop federal statutes of limitations, as a matter of federal common law, to fill the void.

> such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Id., at 338, 91 S.Ct., at 806.

The ILA attempts to avoid the import of this language by arguing that in this case, Conex has not pleaded any individual acts, but only the 1969 Rules on Containers. A reading of the complaint undermines this claim. Conex claims injuries resulting from *enforcement* of the Rules on Containers pursuant to the Dublin Supplement of 1973. It seeks to recover damages for particular acts—refusal to supply containers, pass-through of fines, and unnecessary dockside stuffing and stripping—which occurred within six years of the filing of the complaint. Conex does not, and may not, seek damages which flowed from acts which occurred prior to August 20, 1970. *Cf. United States v. Sealand Service,* 424 F.Supp. 1008 (D.N.J. 1977) (in suit for recovery of penalties for violation of Federal Maritime Commission tariffs by refusal to supply containers, "each decision to withhold requested containers" was an independent act).

ILA also argues estoppel *en pais,* laches, and equitable estoppel. These equitable theories are invoked based on ILA's claims that Conex intentionally avoided challenging the Rules on Containers when they were first implemented because, in fact, Conex thrived on their existence: watching the enforcement of the Rules drive its competitors out of business while developing techniques, including bribery of dock bosses and alteration of shipping documents, to evade the Rules' strictures.

Although the Court's research has unearthed no case law indicating that these equitable defenses may be raised as

a bar to a Section 303 damage claim,[13] the strictly compensatory nature of the 303 action suggests that if, in fact, the challenged acts and practices caused no injury to the business of the plaintiff, no recovery is permissible. In my view, a fuller development of the record, including exploration of the union's claims that Conex itself engaged in illegal conduct in order to circumvent the Rules, is required before the Court can rule on this aspect of the case. Summary judgment must therefore be denied on these equitable grounds as well as on the ground of illegality.

III. The Sherman Act Claims

Count I

Conex asserts also that the determinations of the NLRB "unequivocally establish the existence of a group boycott or concerted refusal to deal." The defendants argue against application of the doctrine of collateral estoppel because, *inter alia,* (1) it would deprive them of their right to a trial by jury; (2) it would frustrate the policy of the federal antitrust laws that exclusive jurisdiction of antitrust claims be vested in the federal courts; and (3) it is inappropriate because there is no identity of issues, no privity, and no opportunity for a full and fair hearing. Defendants argue further that the Rules on Containers are immune from antitrust attack by reason of the labor exemption to the antitrust laws. They argue also that, even if there be no complete immunity, the rule of reason must be applied to determine whether there has been a violation of the Sherman Act. Finally, the defendants raise a number of claims

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[13] In *Falsetti v. U.M.W.,* 355 F.2d 658 (3rd Cir. 1966), the court suggested, in *dicta,* that the equitable doctrine of laches could bar a § 301 claim. See also, *United States v. Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973) (equitable doctrine of laches is applicable to suit under Civil Rights Act of 1964).

which may be styled affirmative defenses: *i.e.,* the illegality of the plaintiffs' own operations, and the primary and exclusive jurisdiction of the Federal Maritime Commission.

A. Labor Law and Antitrust.

In my view, the issues of collateral estoppel, labor exemption and *per se* rule or rule of reason are inseparable. At the heart of each lies the so-called labor exemption to the antitrust law.

It is a commonplace that the antitrust laws and the labor laws are antithetical. The antitrust laws are designed to promote competition; the unions are in the business of limiting it. It has fallen largely to the courts to work out a proper conciliation of these competing desiderata.

While the conflict between labor and antitrust policies begins much earlier, the modern era is often said to begin with *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940). The Supreme Court there held that a union does not violate the Sherman Act by engaging in a violent primary sit-down strike. In Justice Stone's famous *dictum,* the Sherman Act was aimed only at "some form of restraint upon commercial competition in the marketing of goods or services;" *Id.* at 495, 60 S.Ct. at 993, it was not directed toward an elimination of price competition in the labor market.

One year after *Apex,* Justice Frankfurter wrote the Court's decision in *United States v. Hutcheson,* 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941). *Hutcheson* involved a jurisdictional dispute between two unions over a work assignment by Anheuser-Busch. The union that did not get the assignment organized a strike among the employees of certain contractors erecting a building for Anheuser, and a boycott of Anheuser beer by union members and friends. Under the precedent of the time, this was a Sherman Act violation. Justice Frankfurter, however, examined the anti-injunction provisions of the Clayton and Norris-LaGuardia

Acts and announced that activity immunized against injunction by those two statutes could not constitute a substantive offense under the Sherman Act.

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id., at 232, 61 C.Ct., at 466 (footnote omitted). Unlike Justice Stone, who declared in *Apex Hosiery* that the Sherman Act as such did not cover restraints in the labor market, Justice Frankfurter, in *Hutcheson,* created an *exemption* from the antitrust laws for unions "acting alone".

The corollary of this principle was that labor unions lose their immunity when they "aid nonlabor groups to create business monopolies and to control the marketing of goods and services." In *Allen Bradley Co.* v. *IBEW Local 3,* 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945), a union, in the interest of obtaining better wages, hours, and working conditions, induced electrical contractors to agree to use only equipment manufactured by firms having contracts with the union. The Supreme Court rejected the Second Circuit's view that, so long as the union was acting only in its own self-interest, and through means sanctioned by the Clayton Act, it was immune from antitrust sanctions. The Court instead appeared to adopt another *per se* rule: immunity is lost when a labor group is acting to "aid and abet businessmen" in conduct which, if engaged in by businessmen alone, would violate the Sherman Act. Immunity was not achieved merely because the union, acting for its own ends, was the moving force behind the arrangement; if manufacturers agreed, albeit unwillingly and under union pressure, to engage in joint action violative of the

Sherman Act arranged by the manufacturers alone, then the union, and presumably the manufacturers, were in violation.

Two important cases were decided in 1965: *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) and *Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965). In *Pennington,* by way of a counterclaim, a small coal producer sued the United Mine Workers alleging violation of the Sherman Act in the UMW's contract agreement with an association representing large mine operators. The challenged agreement embodied substantial wage concessions by the employers and acceptance by the union of increased mechanization. The union also agreed to impose identical wage terms on smaller non-union coal operators irrespective of those operators' ability to pay such wages. The Supreme Court split three ways on the issue of the UMW's exemption from antitrust liability. The opinion of the Court, delivered by Justice White, held that an agreement resulting from collective bargaining is not automatically exempt from Sherman Act scrutiny merely because the negotiations covered wage standards or other subjects of compulsory bargaining. Expressing displeasure with the agreement at issue, the Court noted that nothing in federal labor policy indicates that a union and employers in one bargaining unit are free to bargain about wages or working conditions in other bargaining units or to settle those questions for the entire industry. In the Court's view, such agreements were clearly contrary to the interests of the union and its duty to bargain unit by unit.

> The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.

Id., at 666, 85 S.Ct., at 1591.

Justice Douglas' opinion, concurred in by Justices Black and Clark, agreed with the result, but emphasized that a wrongful intent is required for antitrust liability. The concurrence noted that the jury should be instructed that "if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that *if it was made for the purpose of forcing some employers out of business,* the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws." *Id.,* at 672-673, 85 S.Ct., at 1595 (emphasis added).

Justice Goldberg, joined by Justices Harlan and Stewart, dissented from the opinion but concurred in the result in a single opinion written for *Pennington* and *Jewel Tea.*

Jewel Tea involved a challenge to a butchers union multi-employer agreement which restricted the hours for sale of meat from 9:00 A.M. to 6:00 P.M. Jewel Tea, a grocery chain wishing to maintain night operations, entered into the agreement under threat of strike but thereafter sued the union and the employers who negotiated the agreement for violation of the Sherman Act. Again, the Court split three ways. Justice White, Chief Justice Warren and Justice Brennan framed the issue as "whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." *Id.,* at 689-690, 85 S.Ct., at 1602. The Court noted that "the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement," and that the collective bargaining agreement was a "combination" between union and employers. *Id.,*

at 691, 81 S.Ct., at 1603. Mechanical application of *Allen Bradley* would have rendered the conduct unlawful and the *Hutcheson* "acting alone" theory was inapplicable. Nevertheless, the Court found an exemption implied by the statutes setting forth the national labor policy. Hours of operation had been a historic concern of the butchers' union and there were indications that night operations would alter the character of the work itself. In that context, hours of operation were sufficiently related to wages, hours, and working conditions to fall within the proper scope of collective bargaining. The agreement was thus exempt from antitrust attack.

Justice Douglas, with whom Justices Black and Clark concurred, reasoned that, because the employers could not themselves agree on hours of operations, the union, by joining with them, exceeded the *Allen Bradley* rule and lost its exemption.

Justice Goldberg wrote an opinion, for both *Pennington* and *Jewel Tea,* in which he was joined by Justices Harlan and Stewart. He took the position that the agreements in both cases dealt with mandatory subjects of collective bargaining. As such, they were immune from antitrust attack. Justice Goldberg viewed the Court's decision as a denial of the right to consider legitimate subjects in the bargaining process and a frustration of the collective bargaining process itself. He deemed the Court's decision in both cases a throwback to past days when courts allowed antitrust actions against unions and employers engaged in conventional collective bargaining, because "a judge considered" the union or employer's conduct in question to be "socially or economically" objectionable.

The most recent Supreme Court pronouncement on the thorny issue of reconciliation of labor and antitrust law is *Connell Construction Co. v. Plumbers & Steamfitters, Local 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). Plumbers Local 100 represented workers in the

plumbing and mechanical trades in Dallas. It had successfully used picketing to force a number of general contractors to agree to subcontract work in the trade only to subcontractors which had collective bargaining agreements with the union. Connell, a general contractor, filed suit in Texas State Court to have the picketing enjoined under state antitrust law. After Local 100 removed to federal court, Connell signed the subcontracting agreement under protest, then sued for violations of Section 1 of the Sherman Act.

Justice Powell wrote for the majority and held that the Clayton statutory exemption was not available because the arrangement involved both labor and nonlabor groups. He further held that the *Jewel Tea* "non statutory" [sic] exemption which may arise by implication and which has its source in the strong labor policy favoring the association of employers to eliminate competition over wages and working conditions was unavailable because the union did not represent or seek to represent Connell's employees. The nonstatutory exemption offers no protection when a union and a non-labor party agree to restrain directly competition in a business market, even if the union's organization objective is lawful. The Court, finding the activity non-exempt, remanded for consideration of whether the agreement violated the antitrust act. In doing so, however, and in explaining Connell's secondary holding that the state antitrust laws were preempted by federal antitrust laws, the majority, citing *Apex Hosiery,* noted that

> Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves.

Id., at 636, 95 S.Ct., at 1842.

The dissenting views of Justices Stewart, Douglas, Brennan, and Marshall were expressed in an opinion by Justice Stewart. The dissenters believed that the picketing at Connell's site was secondary activity because it was designed to induce Connell to agree to subcontract only to firms which had signed collective bargaining agreements with Local 100; the union had no desire to organize or represent Connell's employees. Thus it was proscribed secondary activity, "subject to detailed and comprehensive regulation pursuant to § 8(b)(4) of the National Labor Relations Act . . . and § 303 of the Labor Management Relations Act. . . . Similarly, the subcontracting agreement under which Connell agreed to cease doing business with nonunion mechanical contractors was governed by the provisions of § 8(e) of the National Labor Relations Act." In the view of the dissenters, legislative history unmistakably demonstrated that in regulating secondary activity, "Congress [had] selected with great care the sanctions to be imposed if proscribed union activity should occur." In so doing, Congress rejected efforts to give private parties injured by union activity such as that engaged in by Local 100 the right to seek relief under federal antitrust laws." *Id.*, at 639, 95 S.Ct., at 1843. Justice Douglas joined in the dissent, but also wrote separately to indicate that the result might be different if Connell alleged or attempted to show a conspiracy between Local 100 and the subcontractors, rather than coercion of the employer by the union. *Id.*, at 638, 95 S.Ct., at 1830.

One final Supreme Court decision must be examined before attempting to place the instant case in the precedential framework. That case is *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967), a product boycott-work-preservation case, involving a strike by carpenters who, acting pursuant to their collective bargaining agreement, refused

to hang prefitted doors. The National Woodwork Manufacturers Association filed charges with the NLRB against the union alleging that by including the "will not handle" prefitted doors clause in the collective bargaining agreement, the union had committed the unfair labor practice under § 8(e) of entering into an agreement whereby the employer agrees to cease or refrain from handling any of the products of any other employer, and alleging further that in enforcing the sentence, the union committed the unfair labor practice under § 8(b)(4)(B) of forcing or requiring any person to cease using the products of any other manufacturer. The NLRB dismissed the charges adopting the findings of the Trial Examiner to the effect that the contract provision and its enforcement by the union were primary activity outside the proscriptions of §§ 8(e) and 8(b)(4)(B). See also, *NLRB v. Enterprise Association,* 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977).

The Court of Appeals for the Seventh Circuit reversed. It held that the will not handle agreement violated § 8(e) without regard to any "primary" or "secondary" objective. In the Court's view, the contract clause was designed to effect a product boycott like the one condemned in *Allen Bradley,* and Congress meant, in enacting §§ 8(e) and 8(b)(4)(B) to prohibit such agreements and conduct forcing employers to enter into them. Nevertheless, the court sustained the dismissal of the § 8(b)(4)(B) charge, agreeing that the union's conduct as to the struck contractor involved only a primary dispute protected by the proviso that "nothing contained in this Clause (B) shall be construed to make unlawful [where not otherwise unlawful,] any primary strike or primary picketing . . ."

The Supreme Court held that § 8(b)(4)(A), the predecessor of § 8(b)(4)(B), was directed only at secondary activity, that is, it was meant to protect the employer only from union pressures designed to involve him in disputes not his own. *National Woodwork Manufacturers Ass'n.*

v. NLRB, 386 U.S. at 625-626, 87 S.Ct. 1250. The Court rejected the Association's argument that *Allen Bradley* compelled a finding that the enforcement of the "will not handle" clause violated §8(b)(4)(B). The Court explained *Allen Bradley* as follows:

> . . . [T]he boycott of out-of-state electrical equipment by the electrical contractors' employees was not in pursuance of any objective relating to pressuring their employers in the matter of *their* wages, hours, and working conditions; there was no work preservation or other primary objective related to the union employees' relations with their contractor employers. On the contrary, the object of the boycott was to secure benefits for the New York City electrical manufacturers and their employees. "This is a secondary objective because the cessation of business was being used tactically, *with its eye to its effect on conditions elsewhere.*" . . . [T]he fact is that the boycott in *Allen Bradley* was carried on, not as a shield to preserve the jobs of Local 3 members, traditionally a primary labor activity, but as a sword, *to reach out* and monopolize all the manufacturing job tasks for Local 3 members. It is arguable that Congress may have viewed the use of the boycott as a sword as different from labor's traditional concerns with wages, hours, and working conditions. *But the boycott in the present case*[*s*] *was not used as a sword; it was a shield carried solely to preserve the members' jobs.* We therefore have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product.[14]

[14] This is of course the question addressed by the NLRB and determined adversely to the union in this case. The language of

(footnote continued on following page)

Id., at 629-631, 87 S.Ct., at 1260 (footnotes omitted) (emphasis added). In a footnote which succinctly states the problem which now confronts this Court, the majority stated:

> We likewise do not have before us in these cases, and express no view upon, the antitrust limitations, if any, upon union-employer work-preservation *or* work-extension agreements. See *United Mine Workers of America v. Pennington* . . . .

Id., at 631, n.19, 87 S.Ct., at 1261 (emphasis added). Mr. Justice Harlan concurred but took pains to point out that:

> In view of Congress' deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process, and its recognition of the boycott as a legitimate weapon in that process, it would be unfortunate were this Court to attribute to Congress, on the basis of such an opaque legislative record, a purpose to outlaw the kind of collective bargaining and conduct involved in these cases.

Id., at 649-650, 87 S.Ct., at 1271. Justice Stewart, joined by Justices Black, Douglas and Clark, dissented.

The NLRB decision in this case, affirmed by the Second Circuit, establishes that the Rules on Containers and the enforcement of those rules constituted secondary work acquisition outside the protected scope of *National Woodwork Co.* and proscribed by §8(b)(4) and §8(e). Conex maintains that the Board's findings also establish the oc-

(footnote continued from preceding page)

National Woodwork, however, suggests to me that the NLRB and Second Circuit were wrong: the jobs of the ILA members *were* threatened by the boycotted product and the union activities were not used as an *Allen Bradley* sword to influence labor relations of a different employer.

currence of a group boycott or concerted refusal to deal, *per se* violations of the antitrust laws. Although the Court has decided that the NLRB adjudication is determinative of the labor law issues, *supra,* at 9, that determination is not dispositive of the antitrust claims. In short, the Supreme Court precedent indicates that conduct described as secondary, and thus proscribed by the labor laws, does not *ipso facto* constitute conduct violative of the antitrust laws. In fact, the labor context in which the antitrust claims arise itself militates against the facile conclusion that there is a remedy under the antitrust laws.

It is clear that this case does not fall within the statutory antitrust exemption of *Hutcheson;* the ILA was not acting alone.

It is somewhat less clear that the instant case should not be governed by *Allen Bradley. Allen Bradley* may be read for the proposition that a boycott which directly restricts competition, and which is brought about by a combination of unions and employers, is a *per se* violation of the Sherman Act. But the development of the law did not stop with *Allen Bradley,*[15] and much has occurred since that 1945 decision was written.

Pennington and *Jewel Tea* establish that contracts addressing mandatory subjects of collective bargaining and negotiated in the union's self-interest are immune from antitrust attack, at least where the intent of the parties is

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[15] Even *Allen Bradley* may be read more narrowly as simply holding that the non-statutory exemption is unavailable, but that the activity may still be beyond the scope of the antitrust laws. And certain language in *Allen Bradley* suggests that a union commits an antitrust violation only when it participates in a pre-existing employer conspiracy.

Interestingly, the *Allen Bradley* court treated the situation as if the union had merely joined an already existing conspiracy of employers, while the facts of the case strongly suggest that the union had masterminded the plan.

not blatantly anticompetitive. I believe that this is such a contract.

Whether the ILA's interest in containerization is characterized as work preservation, work acquisition, or work reacquisition, it is beyond dispute that this technological change in the industry and its direct effect on the job security of the longshoremen has been at the very center of labor relations on the waterfront for many years. It posed a serious threat of lost jobs, lost work opportunities, reduced earnings, and reductions in gang size and daily work time to the ILA. A duty to bargain collectively on the subject is imposed by 29 U.S.C. § 158, and the union here was acting to preserve the jobs of its members.

The negotiations which resulted in the Rules on Containers were not only encouraged—but participated in—by a Presidentially-appointed mediator. As early as 1964, a report by the Secretary of Labor stressed the importance of collective bargaining as the means to resolve the "innovation-work preservation" problems which were of critical concern to the longshoremen, to the industry, and to the nation. The 1968 report to the President of the United States by the Board of Inquiry created by Executive Order 11431 stressed the importance of negotiation.

> The economic interests of the industry and the employees are in conflict, and the parties in the course of two months of negotiations have not been able to reconcile their respective interests. Unless the positions of one or both parties is substantially changed, this dispute may persist indefinitely.

The Rules at issue were themselves worked out with the aid of an advisor appointed by the President after a long strike following an 80-day Taft-Hartley cooling-off period. Affidavit of Thomas W. Gleason, May 1, 1977, ¶ 34. Affidavit of James J. Dickman, April 12, 1977, Ex. 4.

Moreover, the Rules were put into effect during a period when all official indications suggested that they were legitimate. In *International Container Transport Corp. v. NYSA* [*ICTC*], 426 F.2d 884 (2nd Cir. 1970), the Court of Appeals for the Second Circuit reversed a grant of preliminary injunctive relief on an antitrust claim, holding that there was little possibility of success on the merits in light of the fact that the ILA was acting in its own self-interest, and citing *Hutcheson* and *Allen Bradley*. In 1969, the Regional Director of the NLRB refused to issue a Board complaint on the ground that the Rules were valid work preservation under *National Woodwork*.

In this context, a finding of *per se* antitrust liability seems fundamentally inequitable and fundamentally at odds with the Supreme Court's decision indicating that the policies of the antitrust acts must be balanced against those reflected in the labor laws.

The decisions of the lower courts which have addressed analogous issues are instructive: none has found a *per se* antitrust violation simply because the challenged actions were found to be outside of either the statutory or implied labor exemptions to the antitrust laws. See *Republic Productions, Inc. v. American Federation of Musicians,* 245 F.Supp. 475 (S.D.N.Y. 1965); *National Dairy Prod. Corp. v. Milk Drivers & Dairy Employees,* 308 F.Supp. 982 (S.D.N.Y. 1970). The decision of the Second Circuit in *Commerce Tankers Corp. v. National Maritime Unions,* 553 F.2d 793 (2nd Cir. 1977), deserves close attention.

Commerce Tankers, for economic reasons, attempted to sell its last remaining vessel to Vantage Steamship Corp. The National Maritime Union, which represented the seamen on the vessel, objected to the sale because Commerce had not obtained a commitment from Vantage to continue the NMU as bargaining representative in accordance with a provision of NMU's collective bargaining agreement

with Commerce. NMU first obtained an injunction against the sale in federal district court. That injunction was reversed after the Regional Director of the NLRB, in a § 10(l) NLRA application, alleged that there was reasonable cause to believe the clause violated § 8(e) of the NLRA. That determination was later confirmed by the NLRB and upheld by the Second Circuit on appeal. Commerce and Vantage then sued NMU alleging its conduct violated both the NLRA and the Sherman Act. The district judge found that the proximate cause of any damage was the original injunction against the sale and limited recovery to the injunction bond posted by NMU.

The Court of Appeals reversed and remanded for consideration of the Sherman Act claims.

> [Commerce and Vantage] ask us . . . to hold that the restraint-on-transfer clause would not be exempt from the antitrust laws under the standards established by *Connell* . . . and that the agreement constitutes a group boycott and is illegal per se under section 1 of the Sherman Act (citation omitted). Both these assertions raise extremely complex and significant questions on the interaction between the federal labor and antitrust laws. The accommodation of the conflicting policies reflected in these laws has aptly been called "a troublesome and unruly issue." See Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U.Chi.L.Rev. 659 (1965). *Connell* indicates that a "nonstatutory" exemption from the antitrust laws in this case . . . turns upon whether the restraint-on-transfer clause was a "direct restraint on the business market . . . that would not follow naturally upon the elimination of competition over wages and working conditions," . . . and whether the inclusion of the clause in "a lawful collective-bargaining agreement" shelters the NMU because of the "federal policy favor-

> ing collective bargaining . . ." *And we do not believe that our prior holding that the clause violated § 8(e) necessarily determines that antitrust issue, although it lends support to appellants' position. And even if the "nonstatutory" exemption does not apply, there is at least a substantial question whether a per se approach under the antitrust law is applicable in the case of a non-exempt labor activity.*

Id., at 801-802 (footnotes omitted), (emphasis supplied). The Court then quotes Professor Milton Handler:

> This brings us to the question of antitrust liability where union activity is held to be non-exempt. The principal danger of these recent rulings is that a finding of antitrust liability will automatically be made whenever the challenged conduct is held to be non-exempt. This would be a *per se* approach with a vengeance. Arrangements may fall outside the scope of mandatory bargaining and yet have no adverse effect on competition. We still must find whether the agreement restrains trade and whether the restraint is unreasonable. A fair reading of *Jewel Tea* . . . satisfies me that the Court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust. Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 239-240 (1971).

Id., at 802, n.8. See also T. St. Antoine, Secondary Boycott: From Antitrust to Labor Relations, 40 Antitrust L.J. 242, 256 (1971). ("Yet even if forbidden under the NLRA, a work acquisition clause has strong labor market overtones, and is thus arguably free of antitrust implications under the *Apex* test.)

Implicit rejection of the *per se* approach also helps to explain the confusion otherwise engendered by the co-

existence of the opinion in *CTC v. NYSA*, and the Second Circuit's affirmance of the Board's order in *ILA v. NLRB*. Affirming the NLRB decision which our plaintiff argues should be given collateral estoppel effect in this case, the Second Circuit referred to *ICTC* this way:

> Admittedly, the rationale given by the court was that in such agreement ILA was acting in its self-interest with the object of preserving for its members work traditionally performed by them as longshoremen. However, Judge Hayes' opinion . . . carefully distinguishes an action (such as the instant one) which is within the exclusive jurisdiction of the NLRB and which is "based on different allegations and seeking an entirely different remedy [where], the court must defer to the Board."

ILA v. NLRB, 537 F.2d 706, 708 n.1 (2nd Cir. 1976). See also *International Association of Heat & Frost Insulators v. United Contractors Ass'n.*, 494 F.2d 1353 (3rd Cir. 1974), *amending* 483 F.2d 384 (3rd Cir. 1973). Thus summary judgment is denied on the Sherman Act claims. Even if the NLRB determination of unlawful work acquisition is given collateral estoppel effect in the § 303 context, that determination does not foreclose the antitrust inquiry. A *per se* approach is inappropriate in these circumstances given the sensitive balancing that must be done to reconcile competing labor and antitrust interests, given the failure of the Supreme Court to articulate a coherent theory adopted by a majority of Justices, given the general trend away from the application of the *per se* rules, and given the fact that, although the agreement has been adjudicated impermissible under the labor laws it was clearly grounded, at least in part, in the unions [sic] perceived goal of protecting the interests of its members vis-a-vis their own

employers, and was given at least initial validation by the executive and judicial branches.

Under these circumstances, trial of the issues of anti-competitive intent and anticompetitive effect is warranted. Summary judgment will, accordingly, be denied.

B. The Illegality Defense.

Although this is sufficient to resolve the motions now pending, interests of judicial economy suggest that the Court now address the asserted defense to the antitrust claim of illegality and primary and exclusive jurisdiction of the National Maritime Commission.

All of the defendants argue that plaintiff's own wrongdoing bars recovery on its antitrust claims. The defense, like the ILA's asserted defense to the Section 303 claim, is based on allegations that, during the relevant time period, plaintiff operated as a freight forwarder without holding the license required under Part IV of the Interstate Commerce Act, 49 U.S.C. §§ 1001 *et seq.* To reiterate, plaintiff, for purposes of this motion, does not deny that it was operating without a license. It argues instead that the asserted defense of "illegality" is insufficient as a matter of law.

The Supreme Court has noted the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes. Thus, in *Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), the court held that plaintiff's participation in an unrelated antitrust conspiracy was no bar to its suit for treble damages.

> If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.

Id., at 214, 71 S.Ct., at 261. In *Perma Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed. 2d 982 (1968), the court held that the doctrine of *in pari delicto* would not bar plaintiff's recovery on an antitrust claim. *Perma Life* was a suit brought by a number of Midas dealers against Midas and its parent corporation. Plaintiffs charged that their dealership agreements with Midas contained provisions for tie-ins, resale price maintenance, exclusive dealing, and territorial restrictions which allegedly contravened federal antitrust law. The district court and the court of appeals ruled in favor of the defendants. The plaintiffs had enthusiastically accepted the agreements and had reaped their benefits; they would not be heard to complain that the agreements were illegal.

The Supreme Court reversed. Justice Black's lead opinion noted that plaintiffs' conduct may have been "morally reprehensible," but that the law nevertheless encourages their suit to further the overriding public policy in favor of competition.

> A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.

Id., at 139, 88 S.Ct., at 1984. Justice White concurred in the judgment, but stated that resolution of these kinds of cases should focus on the purpose of the Clayton treble-damage provision: recovery to private plaintiffs *injured* by conduct violative of the antitrust laws. Justice Fortas also

concurred in the result, but thought that the doctrine of *in pari delicto* could apply where the fault of the parties was indeed of equal magnitude; he did not think that this was such a case. Justice Marshall concurred in the judgment but felt that the principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental to our jurisprudence. In his view, the public interest does not require that a plaintiff who has actively sought to bring about illegal restraints for his own benefit be permitted to demand redress in the form of treble damages from a partner no more responsible for the existence of the illegality than the plaintiff. This, in his view, was not such a case. Justice Harlan, with whom Justice Stewart joined, thought that *in pari delicto* was a proper defense to an antitrust claim, but that the lower courts had improperly applied the doctrine.

In the instant case, plaintiff's alleged wrongdoing is neither participation in the antitrust violation which is the subject of the suit nor participation in an unrelated anticompetitive scheme. Defendants here charge that plaintiff was operating in violation of a completely independent federal regulatory scheme.

Some courts have viewed such an asserted defense as no more than a species of *in pari delicto* and they have rejected it on the authority of *Kiefer-Stewart* and *Perma Life*. In a leading case, *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972), plaintiff, a licensed used car dealer, sued defendant new car dealers charging that they had conspired to prevent plaintiff from furnishing new cars to its customers. Defendants asserted that plaintiff was not licensed under state law to sell new cars. The court examined the public interest which the state licensing scheme sought to protect, but concluded that "the policy values inherent in the antitrust statutes . . . clearly outweigh any social value flowing from a state licensing statute." *Id.*, at 1370.

In *Health Corporation of America, Inc. v. New Jersey Dental Ass'n*, 424 F.Supp. 931 (D.N.J. 1977) (Brotman, J.), plaintiffs were designers and administrators of dental health programs for groups such as unions. By judicial decision and administrative action, they had been found to be operating in violation of the New Jersey Dental Service Corporation Act and the New Jersey Dental Practice Act. They sued defendant dental associations charging, *inter alia*, that the defendants had conspired to monopolize the delivery of dental health care by instituting sham lawsuits and administrative proceedings, and through threats, harassment, coercion and dissemination of misinformation to induce dentists not to contract with plaintiffs. Defendants raised the plaintiffs' unlawful operation as a bar to the antitrust suit. The court rejected the asserted defense. The court discussed *Kiefer-Stewart* and *Perma Life*, and it pointed out that the administration of dental health care programs is neither criminal nor contrary to public policy. It noted that plaintiffs could bring their activities within the law with some operational changes and were attempting to do so. The court concluded:

> Plaintiffs claims will not be dismissed because they were in violation of state statutes. The state has enforced its statutes. This court will not impose an additional penalty.

Id., at 934. See also *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 1975-1 Trade Cas. ¶ 60,187 (D.Colo. 1975), *aff'd* 1977-2 Trade Cas. ¶ 61,565 (10th Cir. 1977) (alleged violations of state and federal licensing laws); *Schnapps Shop, Inc. v. H.W. Wright & Co., Ltd.*, 377 F.Supp. 570 (D.Md. 1973) (violation of state unfair sales act); *Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425 (10th Cir. 1977), *rev'ng* 410 F.Supp. 536 (D.Wyo. 1976) (violation of state liquor licensing laws); *cf. Memorex Corp. v. International*

Business Machines Corp., 555 F.2d 1379 (9th Cir. 1977) (unlawful market presence no bar).

Some courts, on similar facts, have reached a contrary conclusion. *American Bankers Club, Inc. v. American Express Co.*, 1977-1 Trade Cas. ¶ 61,247 (D.D.C. 1977) was a suit by a plaintiff who charged that defendants had conspired to frustrate his attempts to enter the travelers check market. The court dismissed its claims, holding that the interest bearing travelers checks which plaintiff sought to market would violate federal banking laws. Accordingly, plaintiff was deemed not to have any business or property interest in marketing such checks and thus no right to recovery under the antitrust laws.

In an early case, *Maltz v. Sax*, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772, 63 S.Ct. 1437, 87 L.Ed. 1720 (1943), the manufacturer of gambling devices instituted an antitrust suit. Although no federal statute prohibited manufacture or sale of such devices, use of gambling apparatus had been condemned as violative of the Federal Trade Act and gambling had been held, in other contexts, to be against public policy. The court foreclosed recovery on alternative grounds of unclean hands and "no legal right." See also *Heath v. Aspen Skiing Corp.*, 325 F.Supp. 223 (D.Colo. 1971) (ski instructor who had no use permit from the U.S. Forest Service could not prevail in antitrust action against Forest Service permittees who had refused to allow him to conduct a ski school at the ski areas they operated); *Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co.*, 440 F.2d 36 (10th Cir.), *cert. denied*, 404 U.S. 857, 92 S.Ct. 107, 30 L.Ed.2d 99 (1971) (plaintiff who lacked certificate of public necessity from Utah Public Service Commission could not maintain antitrust action charging attempt to monopolize market for electrical power "if [Cottonwood] had no right to sell electricity, then by definition Power Company could not interfere with this

right."); *Turner v. American Bar Association*, 407 F.Supp. 451 (N.D.Ind. 1975), *aff'd sub nom. Taylor v. Montgomery*, 539 F.2d 715 (7th Cir. 1976) (unlicensed lawyers).

If "illegality" were a mere common law defense, a species of *in pari delicto*, *Perma Life* and *Kiefer-Stewart* would preclude the defense. But Section 4 of the Clayton Act itself provides a private treble damage remedy only where a party is "injured in his business or property." "Injury" within this section implies violation of a legal right. *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163, 43 S.Ct. 47, 67 L.Ed. 183 (1922). And the courts in adjudicating antitrust claims have consistently inquired whether plaintiff's "business or property" is worthy of legal protection. See *Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966).

The plaintiff here is not accused of violating a state or even a federal statute in the manner in which it conducted business; it admittedly is precluded by federal law from conducting any such business.

Title 49 U.S.C. § 1010(a)(1) provides, with certain exceptions not relevant here:

> No person shall engage in [freight forwarding] service[s] unless such person holds a permit . . .

Under 49 U.S.C. § 1010(c)

> The Commission shall issue a permit to any qualified applicant therefor, . . . if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act.

The Commission is empowered to enforce these provisions through suit for injunction, 49 U.S.C. § 1017(b). Willful violation is a misdemeanor punishable by fine.

Appendix C—Opinion of District Court.

The Court's task here is not to weigh the importance of the national transportation policy against the policies embodied in the federal antitrust laws. Nor is it to evaluate the comparative moral worth of those who violate one statute or the other. But the Court must read the statute under which plaintiff is suing, and if plaintiff's activities were precluded by federal law, then it has suffered no injury to its business or property which is compensable under the Clayton Act. This is not to suggest that any breach of any magnitude of any state or federal regulatory scheme will render an antitrust plaintiff an outlaw not entitled to invoke the protection of the antitrust laws. But where plaintiff's entire business operation is conducted in blatant, willful violation of federal law, plaintiff will not be heard to complain that the profits of that illegal enterprise have been diminished because of defendant's wrongful refusal to deal. Those who practice law or medicine without a license cannot invoke statutes which prohibit anticompetitive business practices to protect their illegal practice; nor could an unlicensed gun dealer invoke these statutes against the manufacturer. The defense is not insufficient as a matter of law, and summary judgment for plaintiff must therefore be denied.

CONCLUSION

Plaintiff's motion for summary judgment on Counts I and III of the complaint will be denied.[16]

[16] The Court has considered the other contentions raised by the parties, and has concluded that they compel no different result.

APPENDIX D

Order of District Court.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-1645

CONSOLIDATED EXPRESS, INC.,

Plaintiff,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; and UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

Civil Action No. 77-156

TWIN EXPRESS, INC.,

Plaintiff,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN W. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; and UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

For the reasons set forth in this Court's opinion filed this date,

It is, on this 19 day of December, 1977,

Appendix D—Order of District Court.

ORDERED that plaintiffs' motion for partial summary judgment be, and it hereby is, denied.

H. STERN
HERBERT J. STERN
United States District Judge

APPENDIX E

Supplemental Opinion of District Court.

Defendant ILA seeks reargument of the Statute of Limitations question contending that this Court overlooked controlling Supreme Court precedent—that is, Cope v. Anderson, 331 U.S. 461 (1947)—and erred in holding that New Jersey's 6-year Statute of Limitations applied rather than in holding that New Jersey would, quote, "borrow," end quote Puerto Rico's shorter Statute of Limitations.

Defendant assumes that New Jersey has a borrowing statute. Frankly, I can find none. In fact, the New Jersey Supreme Court has said that a litigant who sues in New Jersey Courts on a foreign statutory right not conditioned by limitation in its terms is subject to the applicable New Jersey Statute of Limitations. Pennhurst State School v. Goodhartz Estate, 42 N.J. 266, 200 Atlantic 2d 112 (1964).

While this holding probably does not survive more recent New Jersey decisions which hold that the choice of a limitations period will be made through choice of law interest analysis—Heavner v. Uniroyal, Inc., 63 N.J. 130 (1970)—interest analysis simply has no relevance where the cause of action sued on is a Federal one and State Law is applied simply because there is no Federal Law on the subject.

Assuming that interest analysis applies where the cause of action is created and governed by federal substantive law, this Court still is of the view that New Jersey would apply its own limitations period. In Heavner, the Supreme Court of New Jersey stated:

"We are convinced the time has come . . . to discard the mechanical rule that the limitations law of this state must be employed in every suit on a foreign cause of action. We need go no further now than to say that when the cause of action arises in another state the parties are all present in and amenable to the jurisdiction of that

state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will 'borrow' the limitations law of the foreign state. We presently restrict our conclusion to the factual pattern identical with or akin to that in the case before us, for th re may well be situations involving significant interests of this state where it would be inequitable or unjust to apply the concept we here espouse." End of quotation from the Heavner opinion.

The Court would, thus be compelled to balance the five factors enumerated by the Heavner Court; where the cause of action arose, amenability to suit in other states, the substantial interest, if any, of New Jersey in the suit, which of the state's substantive law will apply, and, finally, whether the other state's Statute of Limitations has run—to determine here the relevant factual contacts. See Allen v. Volkswagen of America, Inc. —— F.2d —— (Third Circuit, May 10, 1977).

The Court notes that the borrowing rule announced in Heavner explicitly seeks to discourage forum shopping by litigants with slender ties to New Jersey who desire the benefit of New Jersey's more favorable limitations period. Thus, New Jersey choice of law rules require a determination of which law will govern the merits of the case.

This is the factor that falls out of the equation completely when the cause of action is one that is created only as a matter of federal law.

Applying the formula to the four remaining factors the analysis would go something like this. None of the acts about which Conex complains occurred in Puerto Rico. Rather, the stripping and restuffing of containers, the denial of containers, and the refusal to accept containers for shipment all occurred in the Port of New York area;

specifically at the New Jersey pierside facilities of Sealand and Sea Train. New Jersey must, thus, be considered the state where the cause of action accrued. The ILA may not be amenable to suit in Puerto Rico. New Jersey does have a substantial interest in the lawsuit in terms of deterring further misconduct within its borders and enforcing the legal duties owed by those acting within the state, albeit that those legal duties have been created by federal law, and the Puerto Rican limitations period has run. This is the happy equation that we are left with under the Heavner test.

Consideration of these four factors suggests no reason why New Jersey would choose not to apply its own limitations period in this case in favor of the limitations period in Puerto Rico. As earlier noted, the New Jersey borrowing rule exists to discourage forum shopping by litigants with slender ties to New Jersey who yet desire the benefit of New Jersey's relatively long limitations period. This policy would not be undermined in the slightest by failure to apply a foreign limitations period in this case. All of the allegedly wrongful conduct occurred in the Port of New York-New Jersey area. Puerto Rican substantive law will not apply. And it is clear that the District of New Jersey was chosen as the place to bring suit because all defendants are amenable to suit here and prior proceedings before Judge Lacey, a member of this Court, took place here.

Thus, assuming that the defendant ILA is correct in its assertion that New Jersey's borrowing rules, that is, common law and not statutory, are applicable here, a conclusion which I do not agree with, even if I were to apply that analysis I would nevertheless conclude that under the circumstances New Jersey Courts would not borrow the Puerto Rican limitations period.

APPENDIX F

District Court's Order Amending Opinion.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-1645

CONSOLIDATED EXPRESS, INC.,

Plaintiff,

v.

NEW YORK SHIPPING ASSOCIATION, INC., et al.,

Defendants.

Civil Action No. 77-156

TWIN EXPRESS, INC.,

Plaintiff,

v.

NEW YORK SHIPPING ASSOCIATION, INC., et al.,

Defendants.

It is on this 22nd day of February, 1978,

ORDERED that this Court's Order filed on December 20, 1977 be, and it hereby is, amended to include the following language:

> Further, it is certified, pursuant to 28 U.S.C. § 1292 (b), and F.R.App.P. 5(a), that this order involves controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The controlling questions are:

1. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury "in its business" which is compensable in an action under Section 303 of the Labor Management Relations Act?

2. Does the NLRB's finding of an unfair labor practice foreclose consideration of the labor exemptions, statutory or implied, to the antitrust laws?

3. Must the legality of the Rules on Containers be tested against a *per se* rule of anti-trust violation?

4. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury to its business which is compensable under the Clayton Act?

H. STERN
HERBERT J. STERN
United States District Judge

APPENDIX G

Relevant Statutes

Section 8(b)(4) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 158(b)(4):

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Section 8(e) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 158(e):

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 303 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 187:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for

any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Section 1 of the Sherman Act, 1890, as amended, 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 3 of the Sherman Act, 1890, as amended, 15 U.S.C. § 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Ter-

ritory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 1914, as amended, 15 U.S.C. § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16 of the Clayton Act, 1914, as amended, 15 U.S.C. § 26:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of

irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

APPENDIX H

Transcript of Motion for 28 U.S.C. § 1292(b) Certification.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Newark, New Jersey
February 22, 1978

Civil No.: 76-1645 and 77-156

CONSOLIDATED EXPRESS, INC.,

Plaintiff,

vs.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

Before: THE HONORABLE HERBERT J. STERN, U.S.D.J.

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[3] The Court: We are meeting here to discuss my other errors. First of all, I should note that the plaintiff's papers were correct. I have a typographical error. I'm going to change the date of August 20, 1976, to August 20, 1977. I'll sign such an order today. So we needn't concern ourselves with that aspect.

By the way, if anybody—this is a very copious opinion. If you see any other typographical errors, please tell me

about it. You'll be doing not only the Court a favor but yourself a favor. You would not have to litigate nonsense. God knows, there are enough issues to litigate.

There are two issues. One is for reconsideration. The second is for certification.

I'm not inclined to reconsider. I have done the best I can. I am willing to admit that I may be wrong. I probably shouldn't say such things on the record. But I would be amazed if as this case winds its way up the ladder of judicial review there aren't many different opinions expressed by many different judges here. It's the nature of this beast. I would be amazed, if this goes on to review by the Court of Appeals and ultimately by the Supreme Court of the United States. I would be amazed if 12 judges or 21 judges consider this thing, that there will be unanimity of opinion among any panel that considers it. It's a most difficult question. Rather, a series of questions. I don't think I'm [4] conceding anything very grave by saying that. I mean only an idiot would think this was a simple case to decide.

There are no really good solutions here. You know, there is no clear path to heaven. I don't think anybody can see exactly which or what advances what interests perfectly. It's all a balancing and an accommodation.

In any event, right or wrong, I'm persuaded that I've done the best I can. You are not going to do any better at this level.

I am also reasonably persuaded, after reviewing the arguments pro and con for certification, that due to the difficulty of the problems here that an Appellate Court might well disagree with me in several critical areas. And I am very much inclined to certify at least some of the questions for immediate review.

I feel that if I have incorrectly decided some of these matters that I may cost the litigants a great deal of money

in terms of discovery which would have to be taken, and a greatly enhanced trial.

Now, I'm not perfectly convinced it ought to be certified. But then again, the Court of Appeals doesn't have to take it.

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[6] The Court: Clearly in the class action area they just don't want it. What concerns me is the legal issues as stated in this case are really monumental. They effect—they stay at the crossroads between the labor laws and the antitrust laws.

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[26] The Court: Another fact that concerns me. I see the issues here of national scope and importance.

Mr. Benkard: I think they are.

The Court: I see that the law that will emerge from this case can have tremendous precedential effect upon the relationships between unions, employers, and third-party businessmen throughout the country. Right now you got a District Court opinion which presumes to say a lot of things [27] about some very difficult issues. Aside from the question of the parties here, does it make sense to get some of these legal issues up for review? I would assume no matter whether a lawyer agrees or disagrees with this opinion, they are going to be negotiating some future contracts around this country with an eye towards what we have said here. Some concern to me.